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Sarah McCarthy

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THE LEGAL AND SOCIAL IMPLICATIONS OF THE NCAA'S "PREGNANCY EXCEPTION" — DOES THE NCAA DISCRIMINATE AGAINST MALE STUDENT-ATHLETES?

I. INTRODUCTION

The National Collegiate Athletic Association ("NCAA") punished University of Kansas football player Eric Butler for doing "the right thing."¹ Butler took a year off from playing football to help raise his newborn daughter.² Now, the NCAA refuses to grant Butler the same rights that it would have offered a female student-athlete.³ Under present NCAA rules, a female student-athlete may obtain a pregnancy exception in order to extend her period of athletic eligibility from five years to six years.⁴ The NCAA, however, does not provide an equivalent or similar exception for male student-athletes.⁵

1. See Chris Wristen, *The Bias of the NCAA*, Aug. 21, 2006, <http://www.ryze.com/posttopic.php?topicid=732490&confid=1031> (on file with author) (praising Butler's decision to take year off from playing football as "not only the right thing to do. It was the responsible, mature and honorable thing to do.").

2. See Debbie Schlussel, *Title IX According to the Dixie Chicks*, Aug. 23, 2006, http://www.debbieschlussel.com/archives/2006/08/title_ix_accord.html (commenting that Butler's involvement in his baby's life was "admirable").

3. See *id.* (arguing that National Collegiate Athletic Association ("NCAA") does not promote equality because "sexist policies" like pregnancy exception not only discriminate against male student-athletes but do not encourage male student-athletes to become involved in their children's lives). The NCAA's decision sends the message that it is more important for female student-athletes than male student-athletes to take time off from collegiate athletics to raise a child. See *id.* "[R]egardless of the social implications, [the exception is] flat out discriminatory." *Id.* The NCAA should use Butler as a role model to encourage future male student-athletes to become more involved in the lives of their children. See Wristen, *supra* note 1 (suggesting that NCAA made wrong decision when it did not grant Butler pregnancy exception).

4. See 2006-2007 NCAA DIVISION I MANUAL, art. 14.2.1 (July 2006), available at http://www.ncaa.org/library/membership/division_i_manual/2006-07/2006-07_dl_manual.pdf ("Five-Year Rule. A student-athlete shall complete his or her seasons of participation within five calendar years from the beginning of the semester or quarter in which the student-athlete first registered for a minimum full-time program of studies in a collegiate institution . . ."). "Pregnancy Exception. A member institution may approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy." *Id.* at art. 14.2.1.3.

5. See Kelly Whiteside, *NCAA Denies Appeal by Kansas Athlete*, USA TODAY, Aug. 15, 2006, at 9C [hereinafter *NCAA Denies Appeal*] (noting NCAA's refusal to grant Butler sixth year of eligibility). NCAA spokesman Erik Christianson said, "[t]he pregnancy exception is explicitly written for female students whose physical condi-

Butler's story begins with both him and his girlfriend planning to attend Northwest Missouri State University, about two hours north of their hometown of Leawood, Kansas.⁶ In February of 2001, however, when the couple learned they were expecting a baby, Butler decided to attend DeVry University in Kansas City, near their hometown.⁷ Thus, Butler's five-year period of eligibility began in the fall of 2001 when he enrolled and started taking classes at DeVry University.⁸

In 2005, after transferring schools, Butler earned a spot on the University of Kansas ("KU") football team.⁹ The KU football program, a Division I-A program in the Big XII conference, offered Butler a chance to be scouted by National Football League recruiters.¹⁰ However, by the fall of 2006, Butler's five-year period of athletic eligibility had expired.¹¹ Three times KU petitioned the NCAA for a waiver of the five-year requirement, but the NCAA denied the petition on all three occasions.¹² On July 31, 2006, Butler

tion due to pregnancy prevents their participation in intercollegiate athletics and therefore is not applicable in this case'" *Id.*

6. See *Butler v. Nat'l Collegiate Athletic Ass'n*, No. 06-2319 KHV, 2006 WL 2398683, at *2 (D. Kan. 2006) (noting that Butler anticipated playing football at Northwest Missouri State); see also Kelly Whiteside, *Suit Tests Ban on Leave for Father-Athletes*, USA TODAY, Aug. 24, 2006, at 10C [hereinafter *Suit Tests Ban*] (stating that Butler and his girlfriend attended high school in Leawood, Kansas).

7. See *Suit Tests Ban*, *supra* note 6 (explaining that couple did not attend Northwest Missouri State because it prohibited infants from living in its dormitories). Northwest Missouri State University describes itself as a four-year fully-accredited university. See Northwest Missouri State University Profile, <http://www.nwmissouri.edu/aboutus/profile.htm> (last visited Mar. 30, 2007) (detailing various facts about Northwest Missouri State University). Conversely, DeVry University offers degrees at more than eighty physical locations or online. See DeVry University, <http://www.devry.edu/home.jsp> (last visited Mar. 30, 2007) (providing general information about school). Most of the degrees offered by DeVry are traditionally in the areas of computer engineering and technology. See DeVry University Accreditation, <http://www.devry.edu/whydevry/accreditation.jsp> (last visited Mar. 30, 2007) (listing accredited programs offered by school).

8. See 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1.1 (noting start of five-year period of eligibility occurs when student-athlete registers for full-time program and attends first day of class); see also *Suit Tests Ban*, *supra* note 6 (pointing out that DeVry University does not have collegiate sports).

9. See *Butler*, 2006 WL 2398683, at *2 (stating that Butler transferred from DeVry University to Avila University to University of Kansas ("KU")). For a further discussion of Butler's time at Avila University, see *infra* note 27 and accompanying text.

10. See *id.* at *4 (highlighting Butler's argument that if temporary restraining order is not granted, he cannot play football and thus will lose additional season to be scouted by National Football League).

11. See *id.* at *2 (noting that Butler's five-year period of athletic eligibility expired in July 2006).

12. See *id.* (specifying KU first requested waiver from NCAA in January 2006, which NCAA denied in April 2006; KU asked NCAA to reconsider request in May

filed suit in the U.S. District Court for the District of Kansas claiming that the NCAA and KU violated his rights under Title IX of the Education Amendments of 1972 ("Title IX").¹³ Butler requested a preliminary injunction against the NCAA to allow him to play on KU's football team during the 2006 season, but the court denied his request.¹⁴

This Comment examines the viability of Butler's claim given the present environment of Title IX interpretation.¹⁵ First, this Comment begins by detailing the facts of Butler's case.¹⁶ Second, this Comment provides a comprehensive look at Title IX by examining the historical development of the statute, a male student-athlete's rights under the statute, and a pregnant female student-athlete's rights under the statute.¹⁷ Third, this Comment discusses the use of precedent established under Title VII of the Civil Rights Act of 1964 ("Title VII") to interpret Title IX.¹⁸ In particular, this Comment explores a male employee's rights under Title VII as well as an employee's maternity and paternity rights under Title VII.¹⁹ Fourth, this Comment analyzes whether the NCAA is subject to the requirements of Title IX.²⁰ Finally, this Comment explores the relevant legal arguments available to both Butler and the NCAA.²¹

2006, but NCAA denied request for reconsideration in June 2006; finally, KU appealed NCAA's denial in August 2006, but NCAA denied appeal in August 2006).

13. See *id.* at *1 (referring to filing information of Butler's suit).

14. See *Butler*, 2006 WL 2398683, at *1 (motioning for temporary restraining order, preliminary injunction, and permanent injunction which would allow Butler to continue playing football while court decides case). The U.S. District Court for the District of Kansas denied Butler's motion because it found that he did not have a substantial likelihood of succeeding on the merits. See *id.* at *3. For a further discussion of the court's reasoning, see *infra* note 39 and accompanying text.

15. For a further discussion of the legal issues surrounding Butler's claim under Title IX of the Education Amendments of 1972 ("Title IX"), see *infra* notes 123-98 and accompanying text.

16. For a further discussion of the facts of Butler's case, see *infra* notes 22-39 and accompanying text.

17. For a further discussion of Title IX, see *infra* notes 40-73 and accompanying text.

18. For a further discussion of Title VII of the Civil Rights of Act 1964 ("Title VII") as it relates to Title IX, see *infra* notes 74-79 and accompanying text.

19. For a further discussion of an employee's rights under Title VII, see *infra* notes 80-110 and accompanying text.

20. For a further discussion of the NCAA's amenability to suit under Title IX, see *infra* notes 111-22 and accompanying text.

21. For a further discussion of the legal analysis of Butler's claim, see *infra* notes 123-98 and accompanying text.

II. BACKGROUND

A. Facts of Butler's Case

In the process of achieving his goal of playing collegiate football, Butler remained dedicated to his girlfriend and their baby.²² In 2001, when Butler learned that his girlfriend was pregnant, he did not shirk his parental responsibilities.²³ Instead, he made personal sacrifices to devote time to his girlfriend and their newborn baby.²⁴ Butler originally planned to attend Northwest Missouri State in Maryville, Missouri to play football.²⁵ Upon hearing that he was going to be a father, however, Butler transferred to DeVry University in Kansas City, Missouri, thus giving up his chance to play football during his first year of college.²⁶

In the spring of 2003, Butler enrolled at Avila University in Kansas City and played collegiate football for the first time during the 2003-2004 season.²⁷ Butler transferred to KU in the fall of 2004.²⁸ He tried out for KU's football team as a "walk-on" and, in the fall of 2005, Butler played as an alternate starter on the defen-

22. See Wristen, *supra* note 1 (commenting on how Butler did "the right thing" and made personal sacrifices by attending different school and not playing football to be part of his girlfriend and their baby's lives).

23. See Schlusell, *supra* note 2 (noting Butler did not leave his girlfriend and their baby as many other fathers do).

24. See Wristen, *supra* note 1 (suggesting that others should look up to Butler as role model because he took year off from playing football to help his girlfriend and their newborn baby).

25. See *Suit Tests Ban*, *supra* note 6 (stating that both Butler and his girlfriend, Chantel Frazier, were from Leawood, Kansas and planned to attend Northwest Missouri State, approximately two hours away from Leawood).

26. See *id.* (commenting that even though Butler could not play football because DeVry University does not have collegiate sports, Butler's enrollment at DeVry University nonetheless began his five-year period of athletic eligibility).

27. See *Butler v. Nat'l Collegiate Athletic Ass'n*, No. 06-2319 KHV, 2006 WL 2398683, at *2 (D. Kan. 2006) (noting that, after attending DeVry University in 2001, Butler did not attend college in fall semester of 2002). In the spring semester of 2003, Butler earned nine credits at Avila University. See *id.* Butler continued taking classes at Avila University during the fall semester of 2003 and the spring semester of 2004. See *id.* Also, on March 6, 2004, Butler and his girlfriend, Chantel Frazier, married. See *id.*

28. See *id.* (pointing out that Butler withdrew from his classes at KU during fall semester of 2004, but re-enrolled at KU in spring semester of 2005 and earned twelve credits).

sive line.²⁹ During the 2005 football season, Butler played in all twelve of KU's games and recorded thirteen tackles.³⁰

When KU realized that Butler's five-year period of eligibility would end in July 2006, KU requested a waiver from the NCAA in accordance with NCAA bylaws.³¹ In April 2006, the NCAA denied KU's waiver request.³² KU asked the NCAA to reconsider its request; again, the NCAA denied the waiver request.³³ On August 3, 2006, KU exercised its last option under NCAA bylaws and appealed the NCAA's decision; seven days later the NCAA denied the appeal.³⁴

29. See *id.* (describing Butler's position on KU football team). The NCAA defines a "walk-on" as a student-athlete who plays in a varsity sport without having received a scholarship. See Debra E. Blum, *An Intense Debate over "Walk-Ons"*, CHRON. OF HIGHER EDUC., July 14, 1993, available at http://www.ncaa.org/gender_equity/resource_materials/AdditionalMaterials/IntenseDebateOverWalkOns_93.pdf (recognizing that most "walk-ons" are not recruited to play on collegiate athletic teams).

30. See Ryan Wood, *Butler's Eligibility Saga Continues*, LAWRENCE-J. WORLD, Aug. 13, 2006, http://www2.ljworld.com/news/2006/aug/03/butlers_eligibility_saga_continues/?sports (on file with author) (noting that KU offered Butler athletic scholarship to return to football team for 2006 season).

31. See *Butler*, 2006 WL 2398683, at *2 (requesting waiver of five-year eligibility rule under article 30.6.1 of NCAA bylaws); see also 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1.5 ("Additional Waivers. The Committee on Student-Athlete Reinstatement, by a two-thirds majority of its members present and voting, may approve such additional waivers to the five-year rule as it deems appropriate. (See Bylaw 30.6.1 for criteria.)"). Under NCAA Administrative Bylaws, art. 30.6.1, a waiver may be granted if a student-athlete is deprived of participating in his or her sport for more than one season "for reasons that are beyond the control of the student-athlete or the institution" *Id.* at art. 30.6.1. If circumstances deprive a student-athlete from participating in his or her sport for only one season, the Committee may still consider the request in "circumstances of extraordinary or extreme hardship." *Id.* The bylaws then list specific circumstances that are considered beyond the control of the student-athlete and specific circumstances that are considered within the control of the student-athlete. See *id.* at art. 30.6.1.1. (listing examples of circumstances beyond control of student-athlete for which NCAA would consider granting waiver such as "a life-threatening or incapacitating injury or illness suffered by a member of the student-athlete's immediate family").

32. See *Butler*, 2006 WL 2398683, at *2 (specifying that NCAA notified KU of denial on April 12, 2006).

33. See *id.* (emphasizing that on May 11, 2006 KU requested reconsideration and on June 14, 2006 NCAA denied KU's request for reconsideration).

34. See *id.* (stating that after NCAA notified KU of its denial of KU's appeal on August 11, 2006, Butler was no longer able to practice with team); see also 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 30.6.1 (detailing that if student-athlete's five years of eligibility have ended, he or she may continue to practice, but not compete, with his or her team for thirty days provided his or her institution has requested waiver, but if NCAA denies waiver before 30-day period ends, student-athlete must stop practicing immediately).

While KU petitioned the NCAA, Butler filed suit in the U.S. District Court for the District of Kansas on July 31, 2006.³⁵ Butler claimed that the NCAA and KU violated his rights under Title IX and the Equal Protection Clause of the Fourteenth Amendment.³⁶ He moved for a temporary restraining order to enjoin KU from enforcing the NCAA's decision to deny him a sixth year of athletic eligibility.³⁷ In addition, Butler requested a preliminary injunction to allow him to continue to practice with the team in preparation for the 2006 football season.³⁸ On August 15, 2006, the district court denied Butler's motion and declined to issue him any temporary relief.³⁹

B. Discussion of Title IX

1. *History of Title IX of the Education Amendments of 1972*

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be

35. See *Butler*, 2006 WL 2398683, at *1 (noting date that Butler filed suit).

36. See *id.* at *3 (pointing out that Title IX, codified at 20 U.S.C. §§ 1681-1688, prohibits discrimination based on sex). This Comment will only focus on Butler's Title IX claim against the NCAA. For a further discussion of Butler's Title IX claim against the NCAA, see *infra* notes 124-97 and accompanying text.

37. See *Butler*, 2006 WL 2398683, at *1 (highlighting Butler's argument that although KU is member institution of NCAA, KU is liable for choosing to enforce NCAA rules).

38. See *id.* (recognizing that Butler also motioned for permanent injunction); see also University of Kansas, 2006 Football Schedule, <http://kuathletics.cstv.com/sports/m-footbl/archive/kan-m-footbl-sched-2006.html> (last visited Mar. 30, 2007) (stressing urgency of Butler's request to continue to practice with team in order to prepare for KU's first football game of 2006 season slated for September 2, 2006).

39. See *Butler*, 2006 WL 2398683, at *4 (holding that Butler did not meet requirements for obtaining temporary restraining order ("TRO") or preliminary injunction). To obtain a TRO, the plaintiff must prove "(1) that he has a substantial likelihood of prevailing on the merits; (2) that he will suffer irreparable injury unless the [TRO] issues; (3) that the threatened injury outweighs whatever damage the proposed [TRO] may cause defendants; and (4) that the [TRO], if issued, will not be adverse to the public interest." *Id.* at *2 (citing *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986)). The court found that Butler did not establish a substantial likelihood of success on his Title IX claim because the NCAA may be able to allow the pregnancy exception in article 14.2.1.3 "for reasons of pregnancy," which appear to be different from reasons of maternity or paternity." *Id.* at *3 (relying on *Johnson v. Univ. of Iowa*, 431 F.3d 325, 332 (8th Cir. 2005)). Concerning Butler's Equal Protection claim, the court found that the NCAA's policy of granting pregnancy exceptions to female athletes appeared to be "substantially related to the achievement of 'important government objectives'" and, therefore, Butler could not establish a substantial likelihood of success. *Id.* (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24 (1982)) (establishing standard party must meet to uphold classification based on gender). Moreover, the court held that Butler will not suffer irreparable injury, that the harm to defendants outweighs the harm to Butler, and that the public interest weighs in favor of defendants. See *id.* at *3-4.

subjected to discrimination under any education program or activity receiving Federal financial assistance"⁴⁰ Title IX requires educational institutions that receive federal funding to provide men and women with equal opportunities.⁴¹ Thus, Title IX applies to almost every college and university across the country.⁴² Four years after the Title IX's passage, the number of women playing collegiate sports increased 600%, totaling over two million by 1976.⁴³

Meanwhile, as more women began to play collegiate sports, schools remained unsure as to whether the additional athletic opportunities provided to female student-athletes were sufficient to render the school Title IX-compliant.⁴⁴ In short, schools did not have adequate Congressional guidance to implement the broad requirements of Title IX.⁴⁵ Presently, three main sources of guidance exist to assist schools in becoming Title IX-compliant: (1) regulations issued by the Department of Health, Education and Welfare ("HEW"), (2) a policy interpretation establishing a three-part effective accommodation test by HEW's Office of Civil Rights ("OCR"),

40. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000).

41. See Stephen F. Ross et al., Remark, *Rededication Panel Discussion on Gender Equity and Intercollegiate Athletics*, 1995 U. ILL. L. REV. 133, 133 (1995) (noting that Title IX requires school "to provide equal educational opportunities for [both] students and employees"). In 1987, Congress passed the Civil Rights Restoration Act ("CRRA"), requiring an entire school to be Title IX-compliant if any part of the school received federal funding. See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 908, 102 Stat. 28, sec. 3(a) (1988) (expanding definition of "program or activity" in 20 U.S.C. § 1681 of Title IX, as defined under § 20 U.S.C. 1687, to include "all of the operations of . . . a college, university or other postsecondary institution . . . any part of which is extended Federal financial assistance . . ."). Congress intended the CRRA to counter the Supreme Court's ruling in *Grove City College v. Bell*. See 465 U.S. 555, 573 (1984) (holding that if specific department within educational institution indirectly received federal funding, it "does not trigger institutionwide coverage under Title IX"). The Court's interpretation of Title IX in *Grove City* severely limited the impact of Title IX because most athletic departments did not receive federal funding directly and, therefore, were not subject to Title IX's requirements. See Megan K. Starace, Comment, *Reverse Discrimination Under Title IX: Do Men Have a Sporting Chance?*, 8 VILL. SPORTS & ENT. L.J. 189, 196 (2001) (discussing effects of Title IX on non-revenue men's athletic teams). CRRA restored Title IX to Congress's original intent, mandating that Title IX be applied to all parts of an educational institution such that if any part received federal funding, then the entire institution was subject to Title IX. See *id.*

42. See Ross, *supra* note 41, at 133 (remarking on broad impact of Title IX).

43. See Starace, *supra* note 41, at 189 (citing huge increase in number of female athletes as result of passage of Title IX).

44. See *id.* at 192 (describing initial uncertainty as to how colleges and universities should apply Title IX as result of lack of secondary legislative materials).

45. See *id.* at 192 n.28 (noting absence of Congressional committee report which usually accompanies final bill as well as lack of substantial congressional debate).

and (3) the Title IX Athletics Investigator's Manual ("Manual") issued by the Department of Education's OCR.⁴⁶

First, in 1975, HEW issued a set of comprehensive regulations to interpret Title IX.⁴⁷ The regulations determine Title IX-compliance by focusing on whether male and female student-athletes receive equal opportunities to play sports, not on the amount of money spent by the school.⁴⁸ In determining if a school provides equal opportunities to its male and female students, the regulations provide a wide variety of factors for the HEW director to consider – from the quality of the equipment, to the availability of academic tutoring, to guidelines regarding publicity.⁴⁹

Second, in response to the continuing confusion regarding Title IX's requirements, HEW's OCR released a policy interpretation in 1979.⁵⁰ The interpretation includes a three-part effective accom-

46. See Ross, *supra* note 41, at 139-40 (mentioning that, in addition to regulations, policy interpretation, and Title IX Athletics Investigator's Manual ("Manual"), statute itself and precedent are also helpful in establishing standards for compliance under Title IX). Currently, the Department of Education's Office of Civil Rights ("OCR") oversees Title IX's enforcement after Congress divided the Department of Health, Education, and Welfare ("HEW") into the Department of Education and the Department of Health and Human Services in 1979. See Cohen v. Brown Univ., 991 F.2d 888, 895 (1st Cir. 1993) (recognizing confusing nature of regulatory framework surrounding Title IX); see also Starace, *supra* note 41, at 197 (pointing out that regulations, policy interpretation, and Manual, together with CRRA, have clarified what is required of schools to become Title IX-compliant). For a further discussion of the CRRA, see *supra* note 41.

47. See Starace, *supra* note 41, at 192 (explaining that Congress instructed HEW to issue regulations in order to clarify requirements of Title IX).

48. See *id.* at 193 (stating that HEW was concerned with "compliance through equal opportunity instead of compliance through equal expenditure").

49. See 34 C.F.R. § 106.41(c) (2006) (defining HEW's use of term equal opportunity). To evaluate whether a school complies with Title IX, the HEW director should consider the following factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice time;
- (4) Travel and per diem allowance;
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors;
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Id.

50. See Policy Interpretation of Title IX of the Education Amendments of 1972, 44 Fed. Reg. 71,413, 71,413 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 86) (commenting that policy interpretation is specifically designed to guide implementation of Title IX in intercollegiate athletics).

modation test.⁵¹ Courts rely heavily on this test to construe Title IX.⁵² Under part one of the test, participation opportunities for male and female students that are "substantially proportionate" to the gender composition of the entire student body render a school Title IX-compliant.⁵³ Alternatively, under part two of the test, a school is Title IX-compliant if it "can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the [underrepresented] sex."⁵⁴ Finally, under part three of the test, a school meets the requirements of Title IX if "the interests and abilities of [the underrepresented] sex have been fully and effectively accommodated by the present program."⁵⁵

51. See Starace, *supra* note 41, at 194 (noting that effective accommodation test only requires one of three parts to be met for school to be considered Title IX-compliant).

52. See *id.* at 194 n.44 (stressing use of effective accommodation test in appellate court decisions).

53. See Policy Interpretation, 44 Fed. Reg. at 71,418 (stating that if school meets this requirement, second and third benchmarks need not be considered); see also *Cohen v. Brown Univ.*, 991 F.2d 888, 897-98 (1st Cir. 1993) (offering that if school does not want to undergo "extensive compliance analysis," it may "stay on the sunny side of Title IX simply by maintaining gender parity between its student body and its athletic lineup"). A school may obtain "substantially proportionate" participation opportunities between the sexes by adding or upgrading teams of the underrepresented sex or, subtracting or downgrading teams of the over-represented sex. See *id.* at 898 n.15.

54. See Policy Interpretation, 44 Fed. Reg. at 71,418 (listing alternative way for school to comply with Title IX if it does not meet first benchmark); see also *Cohen*, 991 F.2d at 898 (mentioning that second benchmark allows school to be Title IX-complaint without having to "leap to complete gender parity in a single bound"). A school meets the second requirement if it can prove an "ongoing effort" to increase participation opportunities for the underrepresented sex. See *id.*

55. See Policy Interpretation, 44 Fed. Reg. at 71,418 (providing final way for school to become Title IX-compliant if it has not met part one or part two of effective accommodation test); see also *Cohen*, 991 F.2d at 898 (noting that most schools attempt to meet requirements of Title IX by satisfying third benchmark). Typically, a university does not meet the first part of the effective accommodation test because the participation opportunities between the sexes rarely reflect the gender composition of the university's student body. See *Cohen*, 991 F.2d at 898. Most universities have limited financial resources and, therefore, do not to meet the second part of the effective accommodation test because it requires expansion of the athletic programs of the underrepresented sex. See *id.* Whereas, if "one sex is demonstrably less interested in athletics," then the third part of the effective accommodation test does not require a university to spend money increasing athletic opportunities for that sex because their interest and abilities are already being met by the present program. See *id.* The third benchmark is strict in that it requires "full and effective" accommodation; however, a school does not necessarily fail if some members of the underrepresented sex are interested in a sport that the school does not offer. See *id.* Once there is "sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team," then a school must provide

Third, the Athletics Investigator's Manual ("Manual") is perhaps the most practical guide to Title IX.⁵⁶ Published by the OCR in 1990, OCR personnel use the Manual as an audit guide to determine if schools are Title IX-compliant.⁵⁷ The Manual includes thirteen "general areas of compliance," as well as examples of how schools can satisfy one of the three prongs of HEW's "effective accommodation" test.⁵⁸ The 1975 regulations, the 1979 policy interpretation, and the 1990 Manual, together, clarify Title IX's requirements.⁵⁹

2. *A Male Athlete's Rights Under Title IX*

During the 1990s, many schools faced budget constraints and, in an effort to reduce their operating expenses, eliminated athletic programs.⁶⁰ Consequently, many student-athletes filed suit against their respective schools, claiming that their schools violated Title IX by eliminating their sports instead of sports played by the opposite sex.⁶¹ Male athletes filed numerous lawsuits claiming that their

an opportunity for the underrepresented sex to participate in that sport. *Id.* (quoting 44 Fed. Reg. at 71,418).

56. See Starace, *supra* note 41, at 196-97 (suggesting that because Manual is so detailed, it has "considerable practical significance"). But see Ross, *supra* note 41, at 140 (noting it is unclear whether courts will use Manual in their legal analysis).

57. See VALERIE M. BONNETTE & LAMAR DANIEL, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL Introduction (1990), available at http://www.ncaa.org/gender_equity/resource_materials/AuditMaterial/Investigator's_Manual.pdf (describing Manual as aiding OCR personnel in handling complaints, scheduling compliance reviews, or issuing letters of finding).

58. See *id.* at 1 (listing thirteen areas included in 1975 regulations and 1979 policy interpretation). For a further discussion of the ten areas in the 1975 regulations, see *supra* note 49 and accompanying text. The remaining three areas of compliance are (1) athletic scholarships, (2) support services, and (3) recruitment of student athletes. See BONNETTE & DANIEL, *supra* note 57, at 1. The Manual specifies the particular data that should be collected for HEW's effective accommodation test and suggests questions to ask of administrators, coaches, and athletes. See *id.* at 22-24. Further, the Manual addresses the difficulty of the effective accommodation test's third benchmark, stating, "[i]f the institution has not conducted a survey or used another method for determining interests and abilities . . . then OCR must determine to what degree the current program accommodates interests and abilities [of the underrepresented sex]." *Id.* at 25. Specifically, the Manual instructs OCR personnel to review the "'expressed interest'" of the underrepresented sex by observing the number of participants on club and intramural teams, sports programs at "'feeder'" schools, and physical education classes. See *id.*

59. See Starace, *supra* note 41, at 197 (commenting that three sources of guidance, along with CRRA, "have all helped to create a better understanding of Title IX").

60. See Charles P. Beveridge, Note, *Title IX and Intercollegiate Athletics: When Schools Cut Men's Athletic Teams*, 1996 U. ILL. L. REV. 809, 810 n.6 (1996) (noting instances in which universities cut athletic teams due to budget constraints).

61. See *id.* (enumerating following lawsuits as resulting from budget constraints: *Kelley v. Bd. of Trs.*, 35 F.3d 265 (7th Cir. 1994), *cert. denied*, 513 U.S. 1128

schools violated Title IX; thus far, none of the suits have been successful.⁶²

For example, in *Kelley*, members of the University of Illinois's men's swimming team sued the school claiming that the elimination of the men's swimming program violated Title IX and the Equal Protection Clause of the Fourteenth Amendment.⁶³ The U.S. Court of Appeals for the Seventh Circuit held that the school did not violate Title IX because "men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body."⁶⁴ Therefore, the University of Illinois's decision proved instead to be "extremely prudent" because it ensured compliance with Title IX under the first benchmark of HEW's 1979 policy interpretation.⁶⁵

(1995); *Favia v. Ind. Univ.*, 7 F.3d 332 (3d Cir. 1993); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993), *cert. denied*, 510 U.S. 1004 (1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995)); *see also Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979) (ruling that Title IX provides for private right of action similar to Title VI of the Civil Rights Act of 1964); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (holding that private individual may bring action for damages against school under Title IX).

62. *See Kelley*, 35 F.3d at 272 (finding that termination of men's swimming program did not violate Title IX); *see also Miami U. Wrestling Club v. Miami U.*, 302 F.3d 608, 615 (6th Cir. 2002) (denying plaintiff's claim that Miami University's elimination of men's wrestling, men's soccer, and men's tennis violated Title IX); *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 770 (9th Cir. 1999) (emphasizing that school may comply with Title IX by "leveling down programs instead of ratcheting them up" as California State University, Bakersfield did when it eliminated men's wrestling team); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 639 (7th Cir. 1999) (reasoning that Illinois State University's termination of men's soccer and men's wrestling did not violate Title IX because basis for decision was to ensure that athletic participation opportunities between sexes remained substantially proportionate to student body in accordance with Title IX); *Chalenor v. Univ. of N.D.*, 142 F. Supp. 2d 1154, 1160 (D. N.D. 2000) (explaining that because "men are still substantially overrepresented within the university's athletic programs," school's decision to eliminate men's wrestling was proper under Title IX); *Gonyo*, 879 F. Supp. at 1004 (stating that school's decision to terminate men's wrestling program did not violate Title IX). "The statute focuses on opportunities for the underrepresented gender, and does not bestow rights on the historically over-represented gender . . ." *Miami U. Wrestling Club*, 302 F.3d at 614 (citing *Cohen v. Brown Univ.*, 101 F.3d 155, 174 (1st Cir. 1996) and *Neal*, 198 F.3d at 770)).

63. *See Kelley*, 35 F.3d at 267 (indicating that plaintiffs sought injunction prohibiting termination of team and damages against Board of Trustees of University of Illinois, chancellor, athletic director, and associate athletic director).

64. *Id.* at 270. The court recognized that the university's decision to eliminate the men's swimming program was based on considerations that program was "historically weak," not "widely offered" in high schools, and did not "have a large spectator following." *Id.* at 269.

65. *See id.* at 269 (noting that university's decision to retain women's swimming program and eliminate men's swimming program promoted compliance with Title IX). Moreover, if the university had also decided to terminate the women's swimming program, it may have been "vulnerable to a finding that it was in

3. *Pregnancy Under Title IX*

Title IX regulations prohibit any school qualifying as a recipient under Title IX from discriminating against a student on the basis of pregnancy.⁶⁶ Title IX regulations also require a school to “treat pregnancy . . . and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy”⁶⁷ Any benefit that a school offers to a temporarily disabled student, therefore, must also be offered to a pregnant student.⁶⁸ If a school does not have a temporary disability leave policy, or if a pregnant student fails to qualify for leave under her school’s policy, then Title IX regulations require a school to treat pregnancy “as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student’s physician”⁶⁹

In *Chipman v. Grant County School District*, the U.S. District Court for the Eastern District of Kentucky ruled that a high school may have violated Title IX when it excluded two female students who had given birth out of wedlock from joining the National Honor Society (“NHS”).⁷⁰ The high school invited every student with a grade point average of at least 3.5 to join the NHS, except the two female plaintiffs.⁷¹ Based on the similarity between Title VII and Title IX, the court applied Title VII precedent to interpret Title IX’s prohibition against pregnancy discrimination.⁷² The

violation of Title IX” because the percentage of female student-athletes is “substantially lower” than the percentage of female students. *Id.*

66. See 34 C.F.R. § 106.40(b)(1) (“A recipient shall not discriminate against any student, or exclude any student from . . . any class or extracurricular activity, on the basis of such student’s pregnancy . . . or recovery therefrom . . .”).

67. *Id.* at § 106.40(b)(4).

68. See Adina H. Rosenbaum, Note, *Citizen-Soldier-Parent: An Analysis of Virginia Military Institute’s Parenting Policy*, 78 N.Y.U. L. REV. 1262, 1270-71 (2003) (stressing importance of comparing school’s treatment of pregnant students with school’s treatment of other temporarily disabled students, not male students who have impregnated female students, when determining if school violated Title IX regulations).

69. 34 C.F.R. § 106.40(b)(5) (commenting that when student returns, she is entitled to same status she held prior to taking leave of absence).

70. See 30 F. Supp. 2d 975, 978 (E.D. Ky. 1998) (ruling that plaintiffs had strong probability of succeeding on merits of case since both students were otherwise eligible to join National Honors Society (“NHS”). Both students were juniors in high school and had grade point averages above 3.5. See *id.* at 977.

71. See *id.* (noting evidence that school considered fact that both students had given birth out of wedlock when it did not extend invitation to students to join NHS).

72. See *id.* at 978 (comparing similar purposes of Title VII and Title IX in preventing discrimination against pregnancy). Courts have recognized that Title VII permits use of a disparate impact theory to prove discrimination in pregnancy

court held that the two female students met their burden of proving "a significant adverse effect on a protected group" because the school did not invite them to join the NHS.⁷³

C. Comparison to Employment Law

1. Courts' Use of Title VII Standards to Interpret Title IX Claims

Regarding Butler's claim, KU associate athletics director Jim Marchiony declared, "[i]f this was in a workplace, this [would be] an open-and-shut case [of gender discrimination]."⁷⁴ Title VII prohibits discrimination in the workplace based on gender.⁷⁵ Even though Butler's lawsuit involves a Title IX claim, Title VII precedent controls because U.S. Circuit Courts of Appeals have held that Title IX claims should be interpreted using Title VII standards.⁷⁶

cases. See *id.* at 978 (citations omitted). The two female students have the burden of proving that "a particular . . . practice has caused a significant adverse effect on a protected group." *Id.* at 979 (quoting *U.S. v. City of Warren, Mich.*, 138 F.3d 1083, 1091 (6th Cir. 1998)). For a further discussion of Title VII generally, see *infra* notes 74-93 and accompanying text, and for a further discussion of pregnancy under Title VII, see *infra* notes 94-110 and accompanying text.

73. *Chipman*, 30 F. Supp. 2d at 979 (quoting *City of Warren*, 138 F.3d at 1091) (holding that school's actions reflected dissimilar treatment between those students who had visibly engaged in pre-marital sexual intercourse and those students who had not).

74. *NCAA Denies Appeal*, *supra* note 5 (commenting on NCAA's refusal to grant Butler pregnancy waiver because only females are eligible to receive pregnancy waiver).

75. 42 U.S.C. § 2000e-2(a)(1) (1997) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."). Title VII defines "employer" as any person with "fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year," excluding the United States government and "a bona fide private membership club" *Id.* at § 2000e(b).

76. See *Preston v. Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (recognizing that "most courts that have addressed the question have indicated that Title VII principles should be applied to Title IX actions, at least insofar as those actions raise employment discrimination claims"); see also *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996) (stating that court is "persuaded" by *Preston*, *Mabry*, and *Lipsett* and will apply Title VII standards to Title IX); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 899 (1st Cir. 1988) (applying Title VII analysis to sexual harassment claim under Title IX); *Mabry v. State Bd. of Cmty. Colls. and Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987) (reasoning that because Title IX and Title VII both prohibit gender discrimination, it is "the most appropriate analogue when defining Title IX's substantive standards"). But see *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992) (finding that Title VII should not be applied to Title IX because it "would [not] result in the kind of orderly analysis so necessary in this confusing area of the law," and further differentiating Title IX as "conditional grant" and Title VII as "outright prohibition"). Further, the Supreme Court specifically declined to address the argument of whether Title VII standards should be used to interpret Title IX in *Franklin v. Gwinnett County Public Schools*. See 503 U.S. 60, 65

First, Title VII and Title IX both prohibit discrimination on the basis of gender.⁷⁷ Legislative history indicates that Congress intended Title IX to extend Title VII's prohibition against gender discrimination to educational institutions.⁷⁸ Finally, given the lack of Congressional intent concerning Title IX and the presence of substantial judicial precedent regarding Title VII, courts "see no reason to establish different substantive standards for [gender] discrimination under Title IX and Title VII."⁷⁹

2. *A Male Employee's Rights Under Title VII*

Although Congress passed Title VII to prevent employment discrimination against female and African-American employees, Title VII also protects Caucasian males against employment discrimination.⁸⁰ A Caucasian male may bring a valid action under Title VII if he can prove that his employer treated him differently than a similarly situated female or minority.⁸¹ Further, he must

n.4 (1992) (noting that because plaintiff did not present argument before Supreme Court, Court "need not address" argument).

77. See *Mabry*, 813 F.2d at 316 n.6 (recognizing similarity of Title VII and Title IX in that they prohibit "identical conduct").

78. See *Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 375 (D. Md. 1994) (commenting that Title VII "'specifically excludes educational institutions from its terms'" (quoting H.R. REP. NO. 92-554 (1971), *reprinted in* 1972 U.S.C.A.N. 2462, 2512)). The only difference between Title VII and Title IX is that Title IX effectively extends Title VII's prohibition against discrimination to educational institutions. See *id.*

79. *Mabry*, 813 F.2d. at 316 n.6 (applying Title VII standards in Title IX case); see also *Preston*, 31 F.3d at 207 (finding that prior precedent established under Title VII "provide[s] a persuasive body of standards to which we may look in shaping the contours of a private right of action under Title IX").

80. See Kathryn Frueh Patterson, Comment, *Discrimination in the Workplace: Are Men and Women Not Entitled to the Same Parental Leave Benefits Under Title VII?*, 47 SMU L. REV. 425, 426 (1994) (stating Congressional intent of Title VII); see also *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (holding that Title VII applied to Caucasian male employees); *Loeffler v. Carlin*, 780 F.2d 1365, 1370 (8th Cir. 1985), *rev'd on other grounds*, *Loeffler v. Frank*, 486 U.S. 549 (1988) (ruling that employer violated Title VII when it discharged Caucasian male employee).

81. See Patterson, *supra* note 80, at 426 (noting situations in which Title VII reverse discrimination claims are proper). See also generally 45C AM. JUR. 2D *Job Discrimination* § 2507 (2007) (recognizing that, when comparing employer's treatment of plaintiff to employer's treatment of employee of different gender or race, plaintiff must be similarly situated to other employee in all material respects). "[T]he test is whether a prudent person, looking objectively at the incidents, would think [the incidents] roughly equivalent and the [two employees] similarly situated" *Id.* The plaintiff and the other employee do not need to be exactly alike; the two employees are similarly situated so long as they are "fair congeners." See *id.* (citing *Molloy v. Blanchard*, 115 F.3d 86, 91 (1st Cir. 1997)). "'In other words, apples should be compared to apples.'" *Molloy*, 115 F.3d at 91 (quoting *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 19 (1st Cir. 1989)).

prove that he was treated differently because of his gender or race.⁸²

In *McDonald v. Santa Fe Trail Transportation Company*, the Supreme Court held that two Caucasian male employees had a valid claim of action under Title VII.⁸³ An employer accused three employees of stealing; two of the employees were Caucasian and the third was African-American.⁸⁴ Six days later, the employer fired the two Caucasian employees and retained the African-American employee.⁸⁵ The two Caucasian employees filed suit against their employer claiming that the employer violated Title VII because the employer treated similarly situated employees differently as a result of their race.⁸⁶ Relying on legislative history, prior precedent, and interpretations of Title VII by the Equal Employment Opportunity Commission ("EEOC"), the Court held that Title VII applied equally to Caucasian and African-American employees.⁸⁷ The Court noted Title VII prohibits "racial discrimination in private employment against whites on the same terms as racial discrimination against nonwhites"⁸⁸

82. See Patterson, *supra* note 80, at 426-27 (listing second requirement of Title VII discrimination suit); see also McDonald, 427 U.S. at 282-83 (stating plaintiff's claim that "the reason for the discrepancy in discipline was that the favored employee is Negro while [plaintiffs] are white."); Loeffler, 780 F.2d at 1370 (affirming lower court's ruling that employer's retention of female employees and termination of male employee "was an act of discrimination [against male employee] based on his sex").

83. See 427 U.S. at 283 ("While [defendant] may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied, alike to members of all races,' and Title VII is violated if, as [plaintiffs] alleged, it was not.").

84. See *id.* at 276 (detailing that three employees were accused of stealing sixty one-gallon cans of antifreeze that were part of customer's shipment).

85. See *id.* (recognizing event that gave rise to employment discrimination claim). The two Caucasian employees then filed complaints with their local union and the Equal Employment Opportunity Commission ("EEOC"), both to no avail. See *id.*

86. See *id.* at 282-83 n.11 (rejecting defense's argument that plaintiff did not sufficiently prove similar degree of culpability between three employees in their complaint). The court stressed that in order to proceed with a valid Title VII claim, the plaintiff must only prove "that other 'employees involved in acts against [the employer] of comparable seriousness . . . were nevertheless retained'" *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

87. See *id.* at 279 (citing precedent, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII prohibits discrimination against "any [racial] group, minority or majority")). The Court also cited legislative history, stating "Title VII was intended to 'cover white men and white women and all Americans'" *Id.* at 280 (quoting Rep. Celler, 110 CONG. REC. H2578 (1964)).

88. McDonald, 427 U.S. at 279. (reasoning from interpretation of Title VII by EEOC). The Court extended "great deference" to the EEOC's interpretation of Title VII and noted that the EEOC "has consistently interpreted" Title VII as applying to Caucasians and African-Americans equally. See *id.* Moreover, the EEOC is

A second case, *Loeffler v. Carlin*, established a male's right under Title VII against employment discrimination based on gender.⁸⁹ The United States Postal Service ("USPS") fired the plaintiff, a male postal employee, for violating a rule prohibiting the "casing" of "boxholder" mail.⁹⁰ The plaintiff claimed that his dismissal violated Title VII because USPS did not fire two similarly situated female employees found to have cased boxholder mail.⁹¹ The U.S. Court of Appeals for the Eighth Circuit affirmed the district court's decision that the plaintiff had been treated differently than similarly situated female employees; the court further agreed that he had been treated differently because of his gender.⁹² The court held that while USPS did have a right to terminate employees who violated the rule, it must discipline employees who violated the rule equally.⁹³

the federal agency responsible for enforcing Title VII. See Susan Deller Ross, *Legal Aspects of Parental Leave: At the Crossroads*, in PARENTAL LEAVE AND CHILD CARE: SETTING A RESEARCH AND POLICY AGENDA 93, 94 (Janet Shibley Hyde and Marilyn J. Essex eds., Temple Univ. Press 1991).

89. See 780 F.2d 1365, 1370 (8th Cir. 1985) (holding that male's claim against reverse discrimination based on gender was valid under Title VII).

90. See *id.* at 1368 (noting that after receiving three suspensions, United States Postal Service ("USPS") terminated plaintiff when it caught him casing boxholder mail for fourth time). Boxholder mail is third-class mail intended for the current resident or occupant at a particular address; casing is the practice by which mail carriers divide boxholder mail in their delivery case prior to leaving the post office, as opposed to dividing boxholder mail as they deliver the mail. See *id.* at 1367.

91. See *id.* at 1368 (finding that rule against casing was continuously and openly violated by plaintiff and two female employees). USPS caught one female employee violating the rule three times, and she received a threat of dismissal; USPS caught the other female employee "on numerous occasions," and she only received a verbal warning. See *id.*

92. See *id.* at 1370 (denying employer's claim that district court had not properly decided that plaintiff had been treated differently because of his gender). The employer claimed that the plaintiff was terminated because "he was the only carrier caught frequently in the act . . ." *Id.* at 1369. The number of times the employer caught the plaintiff casing boxholder mail determined the punishment of the plaintiff. See *id.* (noting defendant's legitimate, nondiscriminatory reason for disparate treatment). The burden then shifted to the plaintiff to prove that the employer's stated reason was a pretext for discrimination. See *id.* Based "on its assessment of the credibility of the [plaintiff's] witnesses," the district court held that plaintiff met his burden of "'persuading the court that a discriminatory reason more likely motivated the employer' or 'showing [the court] that the employer's proffered explanation is unworthy of credence.'" *Id.* at 1369-70 (quoting *Tate v. Weyerhaeuser Co.*, 723 F.2d 598, 603 (8th Cir. 1983)). In situations involving witness testimony, "appellate courts must give even greater deference to the trial court's finding, 'for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.'" *Id.* at 1370. (citing *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)).

93. See *id.* at 1369 (holding that "some violators may not be protected merely because of their gender").

3. *Pregnancy Under Title VII*

In 1978, Congress passed the Pregnancy Discrimination Act ("PDA") which specifies that discrimination against a pregnant employee violates Title VII.⁹⁴ The PDA classifies pregnancy as a disability, meaning that if an employer offers disability leave to male employees and non-pregnant female employees, then the employer must offer pregnant female employees disability leave as well.⁹⁵ Medical textbooks estimate that childbirth results in a six-week period of physical disability.⁹⁶ Once her period of physical disability

94. See Title VII at § 2000e(k) (quoting Pregnancy Discrimination Act ("PDA"): "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . ."). Congress passed the PDA to counter the United State Supreme Court's decision in *General Electric Co. v. Gilbert*. See 429 U.S. 125, 145-46 (1976); see also Deller Ross, *supra* note 88, at 95 (noting that after *Gilbert*, rejecting EEOC's approach to pregnancy in workplace, Congress passed PDA). The EEOC's approach mandated that employers grant pregnant employees the same benefits as other employees. See Deller Ross, *supra* note 88, at 94. In *Gilbert*, the Court held that an employer's policy which excluded disabilities arising from pregnancy did not violate Title VII. See 429 U.S. at 145-46. The Court rejected the plaintiff's argument that the employer's exclusion of pregnancy from its disability plan was "a simple pretext for discriminating against women," reasoning that "[p]regnancy is, of course, confined to women, but it is [also] significantly different from the typical covered disease or disability." *Id.* at 136. Further, the Court stated that "[pregnancy] is not a 'disease' at all, and is often a voluntarily undertaken and desired condition . . ." *Id.* The Court held that Title VII did not require the employer's disability plan to cover the additional risk of pregnancy unique to women. See *id.* at 139.

95. See Patterson, *supra* note 80, at 429 (explaining that if employers do not offer disability leave, then, under PDA, pregnant female employees are not legally required to be given leave). In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, the United States Supreme Court held that an employer must extend the same pregnancy benefits that pregnant female employees receive to pregnant spouses of male employees. See 462 U.S. 669, 676 (1983). Just as an employer cannot legally provide different levels of insurance coverage to spouses of male employees and spouses of female employees, an employer cannot legally provide different levels of pregnancy benefits to female employees and spouses of male employees. See *id.* at 682-84 (stressing EEOC's consistent determination that it is unlawful for employer to provide different levels of insurance coverage for male and female employee spouses).

96. See Patterson, *supra* note 80, at 436 (noting that medical textbooks measure recovery from childbirth "on the healing of a woman's reproductive organs"). Approximately six weeks after childbirth, a woman's reproductive organs have physically recovered, and she "is fully recovered from childbirth at that time." *Id.* Most companies provide maternity leave for the birth of a child in two portions: paid disability leave for a period of six weeks and unpaid childrearing leave for varying lengths of time. See *id.* at 439. Paternity leave, the leave offered to male employees when they become fathers, is equivalent to the length of time offered to female employees as childrearing leave. See *id.* at 439. Based on the 2002 National Survey of America's Families, eighty-nine percent of female employees have access to maternity leave while seventy-one percent of male employees have access to paternity leave. See KATHERIN ROSS PHILLIPS, URBAN INSTITUTE, GETTING TIME OFF:

related to childbirth ends, the female employee is not entitled to additional leave; moreover, her employer may not legally grant her additional leave without offering similar leave to male employees.⁹⁷ Further, if an employer does not have a disability leave policy, an employer may provide time off to pregnant female employees so long as the time granted is based on a showing of "actual physical disability" related to childbirth.⁹⁸

In *Johnson v. University of Iowa*, the U.S. Court of Appeals for the Eighth Circuit held that the University of Iowa did not discriminate against a male employee when it allowed his wife, also a University employee, to take full-time disability leave for four weeks and part-time leave for two weeks following the birth of their child, but denied the same benefit to him.⁹⁹ The court needed to decide if the

ACCESS TO LEAVE AMONG WORKING PARENTS, Apr. 22, 2004, available at <http://www.urban.org/publications/310977.html>. Of those employees with access to leave, forty-six percent of women and fifty-two percent of men have access to more than three weeks of paid leave. See *id.*

97. See *Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa.*, 903 F.2d 243, 250 (3d Cir. 1990) (holding that employer must offer male employees leave for which employer offers female employees without showing of physical disability). In *Schafer*, the employer offered pregnant employees the choice of selecting childrearing leave or maternity leave, both for a period of up to one year. See *id.* at 248. Under the policy, if a female employee chose childrearing leave, she was not required to show a physical disability. See *id.* Because the employer did not require a showing of physical disability, the court held that the employer must also offer male employees the option to select childrearing leave for up to one year. See *id.* The court differentiated childrearing leave and disability leave, noting that the period of childrearing leave is more difficult to determine because "the point at which childrearing leave actually begins and ends is not precise." *Id.* Because childrearing may begin for female employees at the time of childbirth, the court ruled that male employees should also be entitled to childrearing leave at the time of childbirth. See *id.* (realizing need for factual determination in each case); see also *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (noting California statute that provides pregnancy leave to female employees but not to male employees is valid because it is narrowly written to include only period of actual physical disability).

98. See *Guerra*, 479 U.S. at 285, 290 (finding that employer is not prohibited by Title VII or PDA from providing more favorable treatment to pregnant female employees than male employees or non-pregnant female employees provided that favorable treatment does not extend to time period beyond physical disability related to pregnancy, childbirth, or related medical conditions).

99. See 431 F.3d 325, 332 (8th Cir. 2005) (holding that father did not "establish[] the requisite adverse treatment of biological fathers" to succeed under Title VII). When the father requested paid leave, similar to the mother's additional two weeks of part-time paid leave, the university denied his request. See *id.* at 329. The father, however, did receive unpaid leave from the university in accordance with the Family Medical & Leave Act ("FMLA"). See *id.* at 331. Congress enacted the FMLA in 1993 to provide employees with the option of taking up to twelve weeks of unpaid leave for certain family and medical conditions, including the birth of a child. See The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 102(a)(1)(A) (1993) (providing for leave because of son or daughter's birth). The FMLA only applies to employers that have fifty or more employees. See *id.* at

additional two weeks of part-time leave taken by the mother constituted disability leave or childrearing leave.¹⁰⁰ Although the mother obtained a medical release prior to beginning part-time work during the additional two weeks, the court held that the university could have granted the mother the additional two week part-time leave based on her partial disability from childbirth.¹⁰¹ Moreover, even if the father could prove that the additional two weeks constituted childrearing leave, the father did not have a valid Title VII claim because he could not prove that the university treated him differently because of his gender.¹⁰² To prove that the university treated him differently based on his gender, the father would have to compare the university's treatment of him to that of another similarly situated female employee.¹⁰³ The court held, however, that the father and the mother were not similarly situated because the father worked full-time and the mother worked part-time.¹⁰⁴ Further, even if the two employees had been similarly situated in the workplace, they would not have been similarly situated from a phys-

§ 101(4). Further, only employees that have worked at least one year and 1,250 hours are eligible to receive the FMLA's benefits. *See id.* at § 101(2).

100. *See Johnson*, 431 F.3d at 328 (recognizing that if employer grants childrearing leave to mother so she can bond with newborn, there is "no legitimate reason" why employer should not offer same leave to father). The father argued that the additional two weeks were childrearing leave because the mother requested the two weeks "for the exclusive purpose of spending time with and caring for [her] newborn child." *Id.* at 329 (quoting mother's affidavit). The court, however, focused on the university's reasons for granting the additional two weeks, not on the mother's reasons for requesting the two weeks. *See id.* The court held that the two weeks constituted disability leave. *See id.* at 330.

101. *See id.* at 329-30 (detailing father's argument that if mother received medical release, then she must no longer be disabled, and, therefore, any additional time off that she received must be considered childrearing leave). The court rejected the father's argument based on his failure to "consider the possibility of partial disability leave." *Id.* at 330. The court reasoned that the issuance of a medical release to the mother did not mean that she was "medically cleared to return to work full-time without any restrictions . . ." *Id.* The court noted that during the additional two week part-time leave, the mother worked only ten hours per week from home. *See id.*

102. *See id.* (holding that in order for father to be able to make valid Title VII claim, he had to prove that university's stated reason for not allowing him paid leave was pretext and that gender discrimination was real reason).

103. *See id.* (noting that "test for determining whether employees are similarly situated to a plaintiff is a rigorous one." (quoting *Rodgers v. U.S. Bank, N.A.*, 417 F.3d 845, 853 (8th Cir. 2005))). The father must show that he is similarly situated to a female employee "in all relevant respects." *See id.* (citing *Rodgers*, 417 F.3d at 853).

104. *See id.* (reasoning that mother and father were also not similarly situated because "[t]hey had different job responsibilities, worked in different departments and reported to different supervisors").

ical perspective because the mother “had recently gone through the physical trauma of labor.”¹⁰⁵

Alternatively, the father argued that the University of Iowa discriminated against him because its parental leave policy allowed adoptive mothers and fathers to take a one week paid sick leave, yet denied the same benefit to him.¹⁰⁶ The father argued that because the university gave paid leave to adoptive fathers who had not undergone the physical trauma of labor, he should be entitled to paid leave as well.¹⁰⁷ The court applied a rational basis test to the university’s policy and concluded that the policy did not discriminate against the father.¹⁰⁸ The court upheld the university’s policy based on the fact that “[a]doptive parents face demands on their time and finances that may be significantly greater than those faced by biological parents.”¹⁰⁹ While the distinctions between adoptive fathers and biological fathers may be minimal, the court admitted that “[t]he process of classifying persons for benefits inevitably requires that some persons with nearly equal claims will be placed on different sides of the line”¹¹⁰

D. The Applicability of Title IX to the NCAA

In *NCAA v. Smith*, the Supreme Court held that Title IX’s requirements did not apply to the NCAA because the NCAA did not qualify as a recipient under Title IX.¹¹¹ The Court rejected the plaintiff’s argument that the NCAA qualified as a recipient under Title IX because the NCAA received collegiate membership dues from federally-funded colleges.¹¹² The Court, however, left open

105. See *Johnson*, 431 F.3d at 330 (finding that “labor is a distinguishing characteristic” such that father could not claim they were similarly situated).

106. See *id.* at 328 n.2 (stating university parental leave policy with respect to adoptive parents).

107. See *id.* at 328 (arguing that university’s “[p]arental [l]eave [p]olicy contains a ‘biological father exclusion’” because university only provides benefits to mothers and adoptive parents).

108. See *id.* at 331 (emphasizing strict scrutiny test is not applicable because United States Supreme Court has not recognized paid childrearing leave as fundamental right).

109. *Id.* (offering example that adoptive parents do not receive same insurance benefits as biological parents). Adoptive parents may also need time off to handle the administrative matters of adoption. See *id.*

110. *Johnson*, 431 F.3d at 331 (noting further that where line should be drawn is better left to legislature than courts).

111. See 525 U.S. 459, 468 (1999), *vacating as moot* 139 F.3d 180 (3d Cir. 1998) (defining “recipients” as “[e]ntities that receive federal [financial] assistance, whether directly or through an intermediary”).

112. See *id.* (finding that because federal funds paid to colleges were not specifically earmarked for purpose of paying NCAA dues, NCAA did not qualify as

the possibility that Title IX applied to the NCAA based on several other theories presented by the plaintiff.¹¹³ First, the plaintiff argued that Title IX applied to the NCAA because, as member institutions of the NCAA, colleges and universities give the NCAA "controlling authority" over their federally-funded programs.¹¹⁴ Second, the plaintiff maintained that Title IX applied to the NCAA because the NCAA receives federal financial assistance directly and indirectly through the National Youth Sports Program ("NYSP").¹¹⁵ The NCAA created the NYSP to host youth educational programs during the summer months.¹¹⁶ The NYSP Fund finances the NYSP's programs, and the NYSP Fund receives federal financial assistance from the Department of Health and Human Services.¹¹⁷ Therefore, the plaintiff argued that the NCAA, through its relationship with the NYSP and NYSP Fund, qualified as a recipient under Title IX.¹¹⁸

receiving federal financial assistance through intermediary). "At most, the [NCAA's] receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members." *Id.* To hold that a private organization which receives indirect economic benefits is a recipient of federal funding "would yield almost 'limitless coverage.'" *Id.* at 467 (quoting *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 608 (1986)).

113. *See id.* at 469 n.7 (remanding case to U.S. Court of Appeals for Third Circuit to determine whether Title IX applied to NCAA based on one of two alternative theories presented by plaintiff).

114. *See id.* at 469-70 (claiming that because NCAA has authority to control member institutions' federally-funded programs, NCAA must comply with Title IX).

115. *See id.* at 469 (stating second alternative argument made by plaintiff).

116. *See* Matthew P. Hamner, Note, *Bump, Set, Spiked: Determining Whether the National Collegiate Athletic Association is a Recipient of Federal Funds Under Title IX*, 65 Mo. L. REV. 773, 775 n.16 (2000) (stating that National Youth Sports Program ("NYSP") conducts programs developed by NCAA). The programs, which are held at college campuses across the U.S., educate economically disadvantaged children in the areas of athletics, education, health, and nutrition. *See* Isaac Ruiz, *NCAA v. Smith: Must the NCAA Play by the Rules?*, 26 J.C. & U.L. 119, 137 (1999) (noting NCAA exercises "substantial control" over NYSP).

117. *See* *Cureton v. NCAA*, 198 F.3d 107, 110 (3d Cir. 1999) (noting that prior to 1992, Department of Health and Human Services gave NYSP's funding directly to NCAA, without specifying that funds be used for NYSP). In 1989, the NCAA established the NYSP Fund "as a nonprofit corporation to administer the NYSP." *Id.* Subsequent to 1992, the Department of Health and Human Services has given NYSP's funding to the NYSP Fund. *See id.* ("The [NYSP] Fund is regarded as an NCAA 'affiliate.')." *But see* Hamner, *supra* note 116, at 775 n.16 (highlighting NCAA's claim that NCAA is "distinct" entity from NYSP).

118. *See* *NCAA v. Smith*, 525 U.S. 459, 469 (1999) (arguing that because NCAA created NYSP and NYSP Fund, NCAA is both direct and indirect recipient of federal funding and subject to requirements of Title IX). For a further discussion of the relationship between the NCAA, NYSP, and NYSP Fund, see *infra* notes 140-49 and accompanying text.

In the remanded decision, the U.S. Court of Appeals for the Third Circuit held that the NCAA did not have controlling authority over its member institutions.¹¹⁹ Yet, the court stated that the plaintiff's second argument involving the NYSP Fund would be suf-

119. See *Smith v. NCAA*, 266 F.3d 152, 157 (3d Cir. 2001) (reasoning that "NCAA members have not ceded controlling authority to the NCAA by giving it the power to enforce its eligibility rules directly against the students" (citing *Cureton*, 198 F.3d at 117-18)). The court had previously decided the issue of "whether the NCAA has 'controlling authority' over its federally-funded members in the context of Title VI." *Id.* at 155 (referring to *Cureton* decision). Because courts have consistently held that Title IX is interpreted similarly to Title VI, the court's reasoning in *Cureton* binds the *Smith* court. See *id.* at 157-58. In *Cureton*, the court made two findings. See 198 F.3d at 115-17. First, the court held that the NCAA did not control its member institutions because member institutions have a choice as to whether to enforce NCAA's suggested rules against its student-athletes. See *id.* at 117 (relying on *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988)); see also *Smith*, 266 F.3d at 156 (mentioning that member institution may choose not to enforce NCAA's "recommendations and risk[] sanctions, or it could [choose to] voluntarily withdraw[] from the NCAA"). A member institution's claim that its options are "unpalatable does not mean that they [are] nonexistent." *Smith*, 266 F.3d at 156 (quoting *Tarkanian*, 488 U.S. at 198 n.19). Further, the NCAA's constitution specifically states that member institutions retain control over their own athletic programs. See *Cureton*, 198 F.3d at 118. Second, the court ruled that the NCAA was not a recipient of federal funding under Title VI. See *id.* at 114. The plaintiff argued that the NCAA was a recipient of federal funding because the NCAA received federal financial assistance from the Department of Health and Human Services to run the NYSP. See *id.* In rejecting this argument, the court reasoned that the regulations permitted a program-specific approach, meaning that the court considered only the NYSP, not the entire entity of the NCAA, a recipient of federal funding. See *id.* at 113-15. A program-specific approach allows "recipients of [f]ederal financial assistance [to] discriminat[e] with respect to a program not receiving such assistance." *Id.* at 114. Further, the court differentiated the CRRA from the present case. See *id.* at 115 (noting that CRRA overruled program-specific application of Title IX adopted by Supreme Court in *Grove* and implemented institution-wide application). The court stated that the CRRA only mandated institution-wide coverage in cases of disparate treatment; because *Cureton* involved a disparate impact claim, the CRRA did not apply and the regulations permitted a program-specific application of Title IX. See 198 F.3d at 116 (describing plaintiff's claim that NCAA's requirement of minimum score on Scholastic Aptitude Test ("SAT") unintentionally discriminated against African-Americans). Moreover, the court noted that the Department of Education and the Department of Health and Human Services had not amended their regulations so as to require an institution-wide application of Title VI. See *id.* at 115-16. Therefore, the regulations did not require the NCAA to "give an assurance of nondiscrimination with respect to programs [not] affect[ed] [by] the [f]ederally assisted program." *Id.* at 115. Subsequent to the court's holding in *Cureton*, the Department of Education amended its regulations to match the institution-wide application required by the CRRA. See Recent Case, *Title VI: Third Circuit Upholds Viability of Standardized Test Scores as a Component of Freshman Athletic Eligibility Requirements*: *Cureton v. NCAA*, 114 HARV. L. REV. 947, 950-51 (2001) (noting that Department of Education and Department of Health and Human Services have both renounced court's decision in *Cureton* as circumventing congressional intent). "[*Cureton*'s] holding conflicts with federal agencies' long-standing interpretation of the Title VI regulations and, if allowed to stand, will seriously impede the federal government's enforcement of those regulations." *Id.* at 950 n.38 (citations omitted).

ficient to overcome a motion to dismiss.¹²⁰ The court remanded the case to the district court for reconsideration of this issue, noting that if the plaintiff could prove her allegations, then "the NCAA, the NYSP, and the [NYSP] Fund [would be] virtually indistinct."¹²¹ Consequently, the court would then consider the NCAA an indirect recipient of federal financial assistance, subject to the requirements of Title IX.¹²²

III. LEGAL ANALYSIS OF BUTLER'S CASE

A. The NCAA Must Comply With the Requirements of Title IX

For Butler's Title IX claim to succeed against the NCAA, the U.S. District Court for the District of Kansas must hold that Title IX's requirements apply to the NCAA.¹²³ Given the Supreme Court's ruling in *NCAA v. Smith*, Butler can proffer several argu-

120. See *Smith*, 266 F.3d at 163 n.9 (holding that "[the plaintiff simply] presents a viable theory for subjecting the NCAA to Title IX's requirements"). Therefore, the plaintiff may amend her complaint to include an allegation that the NCAA is a recipient of federal financial assistance based on the fact that the NYSP Fund receives federal financial assistance. See *id.* at 163.

121. *Id.* at 162 (stating that while court is "hesitant to impose Title IX obligations on an entity that is not a direct recipient of federal financial assistance, [it] nonetheless note[s] that [Title IX obligations will be imposed on] 'those who truly assume control of federally-funded programs'"). Moreover, if the court does find that the NCAA is an indirect recipient of federal financial assistance, then the NCAA will be obligated to comply with Title IX not only with regard to the NYSP, but with regard to all of its programs. See *id.* at 160 n.6 (citing CRRA which significantly expanded definition of recipient under Title IX by eliminating program-specific application of Title IX and requiring institution-wide application of Title IX if one program at institution received federal financial assistance). For a further discussion of the CRRA, see *supra* note 119.

122. See *Smith*, 266 F.3d at 162 n.8 ("[T]he Department of Health and Human Services has issued two letter determinations that the NCAA is a recipient of federal [financial] assistance by virtue of the Department's grant to the NYSP Fund."). Further, in *Bowers v. NCAA*, the court held on two separate occasions that "there was a genuine issue of material fact as to whether the NCAA was a recipient of federal financial assistance." *Id.* at 162-63 (citing 9 F. Supp. 2d 460, 494 (D. N.J. 1998) and 118 F. Supp. 2d 494, 529 (D. N.J. 2000)). The court lists several facts weighing in favor of considering the NCAA an indirect recipient of federal financial assistance: (1) the NYSP was run exclusively by the NCAA prior to the establishment of the NYSP Fund in 1989 and the NYSP has remained substantially the same since 1989; (2) there is evidence to suggest that the NYSP Fund was established for the sole purpose of removing the NCAA from the reach of Title IX; and (3) in substance, the NYSP Fund appears "indistinct" from the NCAA based on the fact that the NCAA administers the NYSP Fund for a dollar a year, the NYSP Fund has no employees, and the NYSP Fund's address is that of the NCAA. See *id.* at 162. The court held that to ignore these factors "would be to elevate form over substance in a way that should not be countenanced." *Id.* at 163 (quoting *Bowers*, 118 F. Supp. 2d at 529).

123. For a further discussion of Title IX, see *supra* notes 40-73 and accompanying text.

ments to persuade the court that Title IX applies to the NCAA.¹²⁴ First, Butler can argue that because the NCAA has controlling authority over its member institutions, the NCAA should be considered a recipient of federal financial assistance and, therefore, subject to the requirements of Title IX.¹²⁵ As member institutions of the NCAA, colleges and universities allow the rules of the NCAA to govern their athletic programs.¹²⁶ Moreover, colleges and universities often give the NCAA complete control of their athletic programs.¹²⁷ While the NCAA refers to its rules as suggestions, member institutions know that if they fail to follow these suggestions, they risk expulsion from the NCAA.¹²⁸

The consequences of expulsion from the NCAA would be detrimental not only to the member institution's athletic department, but to the institution as a whole.¹²⁹ For many institutions, col-

124. For a further discussion of the arguments that Butler can pursue, see *infra* notes 125-32 and notes 141-50.

125. See *NCAA v. Smith*, 525 U.S. 459, 469-70 (1999) (mirroring argument made by plaintiff). The Supreme Court remanded the case to determine whether Title IX applied to the NCAA under one of two alternative theories argued by the plaintiff. See *id.* In the remanded decision, the U.S. Court of Appeals for the Third Circuit stated that Title IX did not apply to the NCAA based on the plaintiff's theory that the NCAA has controlling authority over its member institutions. See *Smith v. NCAA*, 266 F.3d 152, 157 (2001). For a further discussion of the court's remanded decision, see *supra* note 119 and accompanying text.

126. See *Smith*, 266 F.3d at 154 (stating that when members join NCAA, they "agree to abide by and enforce [NCAA] rules").

127. See JOHN V. LOMBARDI ET AL., *THE CENTER, U. OF FLA., THE SPORTS IMPERATIVE IN AMERICA'S RESEARCH UNIVERSITIES* 7-8 (Nov. 2003), available at <http://the.center.ufl.edu/TheSportsImperative.pdf> (describing rules of NCAA as "extensive and detailed" and noting that NCAA rules "control most aspects of college sports"). The NCAA governs athletic programs at member institutions in order to prevent them from "compet[ing] so intensely [so as to] destroy the sports enterprise" *Id.* at 7. Therefore, member institutions "operate primarily in response to the rules of the NCAA and their conferences and secondarily in response to particular values or circumstances of their own institutions." *Id.*

128. See *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988) (pointing out plaintiff's argument that "the power of the NCAA is so great that [member institutions have] no practical alternative to compliance with its demands").

129. See Corey M. Turner, *The National Collegiate Athletic Association: Academics vs. Athletics*, SPORT SUPPLEMENT: A SUPPLEMENT OF THE SPORTS J., 2003 (detailing large financial payoffs member institutions receive as result of their NCAA membership). As a not-for-profit entity, the NCAA must distribute a substantial amount of its revenue to its member institutions. See *id.* (noting that 2002-2003 proposed budget of NCAA listed operating revenues in excess of \$400,000,000). After subtracting operating expenses, the NCAA distributes money to its member institutions based on the member institution's division. See *id.* The NCAA divides its member institutions into three divisions. See *What's the Difference Between Divisions I, II, and III*, available at www.ncaa.org (follow "About the NCAA: membership" hyperlink; then follow "The Differences Between Divisions I, II, and III" hyperlink) (last visited Mar. 30, 2007). Division I member institutions "sponsor at least seven sports for men and seven for women (or six for men and eight for women) with

legiate athletics generate a substantial amount of income.¹³⁰ Additionally, expulsion from the NCAA, the predominant governing body of college athletics, would necessarily mean the end of elite intercollegiate competition.¹³¹ A member institution's decision to disobey the suggestions of the NCAA, thus, significantly alters its image and hinders its financial resources.¹³²

Conversely, the NCAA can argue that it does not have controlling authority over its member institutions, and, therefore, Title IX does not apply to the NCAA.¹³³ The NCAA does not control its

two teams for each gender." *Id.* Other qualifications for Division I member institutions vary for each sport and include the number of games played against Division I opponents, the number of home games played, and even minimum attendance requirements for Division I football programs. *See id.* Division II and Division III member institutions must each "sponsor at least five sports for men and five for women (or four for men and six for women) with two teams for each gender" as well as meet other various qualifications. *Id.* For example, Division III member institutions cannot give student-athletes athletic scholarships. *See id.* Because Division I member institutions "generate a great majority of the NCAA's revenue," Division I member institutions received seventy percent of the NCAA's operating revenue over operating expenses. *See Turner, supra.* Whereas, "Division II and Division III schools combined [received] seven percent." *Id.* Further, conferences that fare well in the annual NCAA Basketball Tournament receive additional monies. *See id.* For example, the Big East Conference received additional monies totaling almost \$40 million during the fiscal years 1995-1996 through 2001-2002. *See id.* "Thus, conferences, and by extension their institutions, reap huge financial rewards for athletic success . . ." *Id.* (noting NCAA's reward of athletic achievement over academic achievement); *see also Lombardi, supra* note 127, at 37-38 (describing football's Bowl Championship Series ("BCS") and listing estimated amount of money each institution received for participating in Bowl game). The estimated 2003-2004 minimum payout per team ranged from \$750,000 to \$14 million. *See id.*

130. For a further discussion of the financial benefit of NCAA membership, *see supra* note 129. *But see Lombardi, supra* note 127, at 20 ("Almost all intercollegiate sports require a subsidy from the parent institution's discretionary funds."). "A few programs earn enough money . . . to pay the full cost of their operations, but most do not." *Id.* Although an institution's sports programs may not be able to sustain themselves financially, they are nonetheless a vital part of the institution. *See id.* at 12. For example, sports programs encourage alumni involvement; in turn, alumni donate substantial amounts of money to the institution. *See id.* Also, college athletics "capture public enthusiasm for the institutional name and image, and attract large numbers of people to the campus." *Id.*

131. *See Doug Bakker, NCAA Initial Eligibility Requirements: The Case Law Behind the Changes*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 160, 162 (2006) (noting that despite common misconception that NCAA is only intercollegiate athletic association, alternatives exist such as National Association of Intercollegiate Athletics and United States Collegiate Athletic Association). *But see Tarkanian*, 488 U.S. at 198 n.19 (commenting that member institution's "desire to remain a powerhouse among the Nation's college basketball teams is understandable, and nonmembership in the NCAA obviously would thwart that goal.").

132. For a further discussion of the impact of expulsion from the NCAA on a member institution, *see supra* notes 129-31 and accompanying text.

133. *See Smith v. NCAA*, 266 F.3d 152, 157 (2001) (reasoning that because U.S. Court of Appeals for Third Circuit previously rejected controlling authority

member institutions because the institutions are free to choose whether they wish “to enforce or ignore” the NCAA’s rules.¹³⁴ Moreover, member institutions can withdraw their membership from the NCAA at any time.¹³⁵ The institution itself has the “ultimate decision as to which [student-athletes] participate in varsity intercollegiate athletics”¹³⁶ Under NCAA rules, the NCAA has no authority to make this decision; it can only suggest to the institution the decision that the NCAA deems appropriate.¹³⁷ Finally, the NCAA’s constitution specifically states that member institutions will

theory in *Cureton v. NCAA*, “[plaintiff] is precluded from amending her complaint to include her ‘controlling authority’ theory, as it is futile” (relying on *Cureton*, 198 F.3d 107, 117-18 (3d Cir. 1999)). For a further discussion of the court’s reasoning in *Smith* and *Cureton*, see *supra* note 119 and accompanying text.

134. See *Smith*, 266 F.3d at 157 (“We emphasize that [member institutions] have not ceded controlling authority to the NCAA by giving [the NCAA] the power to enforce its eligibility rules directly against the [institution’s] students.” (quoting *Cureton*, 198 F.3d at 157)). But see *NCAA v. Tarkanian*, 488 U.S. 179, 198 (1988) (stating plaintiff’s argument that, in reality, member institutions must comply with rules of NCAA because NCAA is so powerful); see also *Turner*, *supra* note 129 (suggesting that, as member institutions of the NCAA, institutions receive significant amount of income from NCAA in exchange for “conduct[ing] their athletic programs in a manner consistent with NCAA regulations”).

135. See *Tarkanian*, 488 U.S. at 198 n.19 (recognizing that, as alternative to expulsion, member institution can choose not to enforce NCAA rules and risk additional sanctions or member institution can choose to voluntarily withdraw from NCAA). Because a member institution’s “options [are] unpalatable, does not mean that they [are] nonexistent.” *Id.* The member institution argued that “the power of the NCAA is so great that the [member institution] had no practical alternative to compliance with [the NCAA’s] demands.” *Id.* at 198. However, the Court reasoned that even if a member institution must abide by the rules of the NCAA, “it does not follow that [the NCAA] is therefore acting under the color of state law.” *Id.* at 198-99 (noting that plaintiff’s Fourteenth Amendment due process claim depended on Court’s finding of state action).

136. *Smith*, 266 F.3d at 156 (emphasizing that who is allowed to attend member institution and who is allowed to represent member institution on athletic field is member institution’s choice).

137. See *Cureton*, 198 F.3d at 117-18 (holding that NCAA does not have power to directly enforce its rules on member institutions’ student-athletes). For example, in *Tarkanian*, an NCAA investigation of the University of Nevada - Las Vegas (“UNLV”) basketball program found thirty-eight violations of NCAA rules. See 488 U.S. at 185-87. The NCAA’s Committee on Infractions proposed a set of sanctions against UNLV, including a two-year prohibition from postseason games and television appearances as well as the firing of their basketball coach. See *id.* at 186. “The Committee also requested UNLV to show cause why additional penalties should not be imposed against UNLV if it failed to discipline [their basketball coach] by removing him completely from [their] athletic program during the probation period.” *Id.* UNLV unsuccessfully appealed the Committee’s findings to the NCAA Council. See *id.* UNLV’s President then considered UNLV’s options: rejecting the NCAA Committee’s proposed sanctions and risking further sanctions; implementing the Committee’s proposed sanctions; or voluntarily withdrawing from the NCAA. See *id.* at 187. UNLV’s President chose to implement the Committee’s recommendations, “[r]ecogniz[ing] the University’s delegation to the NCAA of the power to act as ultimate arbiter of these matters” *Id.*

retain control over their own athletic programs.¹³⁸ The NCAA has neither actual nor apparent authority to control its member institutions and, therefore, does not fall within Title IX's reach.¹³⁹

Second, Butler can argue that Title IX applies to the NCAA because the NCAA, through its relationship with the NYSP Fund, receives federal financial assistance.¹⁴⁰ The NYSP Fund receives federal assistance from the Department of Health and Human Services.¹⁴¹ Because the NCAA created the NYSP, and because the NCAA exercises substantial control over the NYSP Fund, the NCAA, the NYSP, and the NYSP Fund are indistinguishable.¹⁴² Additionally, the NCAA makes decisions which determine whether the NYSP Fund will meet its obligations to receive federal funds.¹⁴³ The NCAA is more than a beneficiary of federal funds; the NCAA is a recipient of federal funds and subject to the requirements of Title IX.¹⁴⁴

138. See NCAA CONST. art. 6, § 6.01.1 ("The control and responsibility for the conduct of intercollegiate athletics shall be exercised by the institution itself . . .").

139. See *Smith*, 266 F.3d at 157 (reasoning that, based on court's decision in *Cureton*, NCAA does not have controlling authority over its member institutions). For a further discussion of the court's reasoning in *Smith* and *Cureton*, see *supra* note 119 and accompanying text.

140. See *NCAA v. Smith*, 525 U.S. 459, 469 n.7 (1999) (remanding issue to U.S. Court of Appeals for Third Circuit to determine whether NCAA's relationship with NYSP Fund subjects NCAA to Title IX); see also *Smith*, 266 F.3d at 163 n.9 (suggesting that NCAA may be obligated to comply with Title IX based on NYSP Fund's receipt of federal financial assistance). Although the decision of the U.S. Court of Appeals for the Third Circuit in *Smith* is not binding on the U.S. District Court for the District of Kansas, the Third Circuit's decision does allude to the strength of Butler's argument. See Administrative Office of the U.S. Courts, <http://www.uscourts.gov/courtlinks/> (last visited Mar. 30, 2007) (illustrating that U.S. District Court for District of Kansas is part of Tenth Circuit). Butler may be successful in maintaining that, as a result of its relationship with the NYSP Fund, the NCAA qualifies as a recipient of federal financial assistance. See *Smith*, 266 F.3d at 163 n.9 (noting that plaintiff's argument is "a viable theory for subjecting the NCAA to Title IX's requirements" and remanding issue to district court); see also *Bowers v. NCAA*, 118 F. Supp. 2d 494, 528 (D. N.J. 2000) (noting factual issue that NCAA may be recipient of federal funds based on NYSP Fund's receipt of federal funds).

141. For a further discussion of NYSP Fund, see *supra* notes 115-22 and accompanying text.

142. See *Smith*, 266 F.3d at 162 (claiming that NCAA, NYSP, and NYSP Fund are "virtually indistinct").

143. See *id.* at 161 (applying Supreme Court's test in *Paralyzed Veterans*, which states that entity qualifies as recipient of federal funding if entity is in "'position to accept or reject . . . obligations'" of federal financial assistance (quoting *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606 (1986))).

144. See *id.* (supporting idea that NCAA itself receives federal funds because NCAA has power to decide whether NYSP Fund meets obligations of federal financial assistance).

Moreover, “[a]ccording to a member of the NYSP’s Board of Directors, the [NYSP] Fund was established because the NCAA wanted to ensure that it was not a recipient of federal [financial assistance].”¹⁴⁵ The NCAA’s actions, therefore, indicate that it had significant control over the NYSP.¹⁴⁶ The NCAA continues to maintain this same level of control over the NYSP.¹⁴⁷ With the establishment of the NYSP Fund, the NCAA merely added a layer of bureaucracy, attempting to artificially differentiate the NYSP from the NCAA.¹⁴⁸ The NCAA’s actions should not deceive the U.S. District Court for the District of Kansas; Title IX applies to the NCAA’s actions because the NCAA receives federal financial assistance.¹⁴⁹

In response, the NCAA can argue that it does not receive federal financial assistance because the NCAA and the NYSP Fund are separate legal entities.¹⁵⁰ The Department of Health and Human Services confers federal monies to the NYSP Fund directly.¹⁵¹ Then, the NYSP Fund’s Board of Directors determines how to dis-

145. *Id.* at 162 (suggesting that NCAA established NYSP Fund to evade being considered recipient of federal financial assistance).

146. *See id.* (arguing that NCAA would not have established NYSP Fund if NCAA did not have level of control over NYSP sufficient to render NCAA recipient of federal financial assistance).

147. *See Smith*, 266 F.3d at 162 (recognizing that “despite the creation of the Fund, the NCAA’s role in relation to the NYSP essentially remained the same”). For a further discussion of the relationship between the NCAA, NYSP, and NYSP Fund, see notes 140-53 and accompanying text.

148. *See Cureton v. NCAA*, 198 F.3d 107, 119 (3d Cir. 1999) (McKee, J., concurring in part and dissenting in part) (suggesting remand of case to determine if NYSP Fund is “alter ego” of NCAA).

149. *See Bowers v. NCAA*, 118 F. Supp. 2d 494, 529 (D. N.J. 2000) (stressing that court should not “elevate form over substance” and finding “genuine issue of material fact” as to NCAA’s actual control over NYSP Fund).

150. *See Cureton*, 198 F.3d at 110 (claiming that NYSP Fund is regarded as “‘affiliate’” of NCAA); *see also* Cedric W. Dempsey, *NCAA’s Government Affairs Report Summary*, Dec. 3, 1999, http://www.ncaa.org/databases/reports/2/presidents_council/200001pc/200001_d2_pc_agenda_s16.html (“The NCAA continues to defend its relationship, as an indirect contributor to the NYSP Fund and is not a recipient of the funds through its relationship with the NYSP.” (quoting memorandum from Cedric W. Dempsey, NCAA President)). *But see* NCAA, *Notes to Consolidated Financial Statements*, at 30 (Aug. 31, 2000 and 1999), *available at* http://www.ncaa.org/library/membership/membership_report/2000/financial_statement_notes.pdf (discussing NYSP Fund in financial statements of NCAA and describing NYSP Fund as “an independent non-profit organization”). On August 11, 2000, “the NCAA Executive Committee approved the dissolution of its [NYSP] Committee as part of restructuring and clarifying the relationship between the NCAA and the NYSP Fund. The restructuring resulted in a non-for-profit [NYSP Fund] Board that has representation from Federal agencies, participating institutions and members from the private sector.” *Id.* The NYSP Fund’s Board of Directors monitors all of the monies received by the NYSP Fund. *See id.*

151. *See Cureton*, 198 F.3d at 110 (emphasizing that federal financial assistance for NYSP is no longer given directly to NCAA).

tribute the funds.¹⁵² As a result, the NCAA does not receive federal financial assistance because the NCAA does not make decisions, which determine whether the NYSP Fund will meet the requirements to receive federal monies.¹⁵³

B. The NCAA's "Pregnancy Exception" Violates Title IX Because It Discriminates Against Male Student-Athletes

The bylaws of the NCAA discriminate against male student-athletes because the bylaws provide a pregnancy exception to female student-athletes only.¹⁵⁴ A pregnancy exception exempts female student-athletes from athletic eligibility requirements beyond their period of physical disability related to pregnancy.¹⁵⁵ The typical period of physical disability related to pregnancy is approximately six weeks; that is, most female student-athletes physically recover from giving birth after six weeks.¹⁵⁶ The NCAA bylaws, however, allow for a pregnancy exception which gives female student-athletes an additional year within which to utilize their four years of eligibility.¹⁵⁷ The bylaws provide no such exception for male student-athletes who have fathered a baby and wish to take time off from playing their sport.¹⁵⁸

Moreover, the NCAA bylaws do not specify when, in relation to her athletic season, a female student-athlete must become pregnant

152. See *Smith v. NCAA*, 266 F.3d 152, 162 (2001) (noting that NYSP Fund, as not-for-profit corporation, has its own board of directors charged with "administer[ing] the NYSP"). But see *id.* at 161 (stating plaintiff's argument that "all of the members of the [NYSP] Fund's Board [are] either employees of the NCAA or members of the NCAA's NYSP Committee").

153. See *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 606 (1986) (defining recipients of federal funding as "those who are in a position to accept or reject . . . obligations" of federal financial assistance).

154. For a further discussion of the differences between the treatment of male and female student-athletes expecting a child, see *infra* note 158 and accompanying text.

155. See 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1.3 (allowing member institutions to grant additional year of eligibility to pregnant female student-athletes).

156. For a further discussion of the typical length of time for maternity and paternity leave, see *supra* note 96 and accompanying text.

157. See 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1 (stating that student-athletes have four years of eligibility and five calendar years from date of initial full-time college enrollment within which to utilize four years of eligibility). Under article 14.2.1.3, however, a female student-athlete may obtain a pregnancy exception allowing her to utilize her four years of eligibility within six years instead of five years.

158. See *NCAA Denies Appeal*, *supra* note 5 ("The pregnancy exception is explicitly written for female students whose physical condition due to pregnancy prevents their participation in intercollegiate athletics and therefore is not applicable in [a male student-athlete's] case" (quoting NCAA's Erik Christianson)).

or must give birth in order for her to be eligible for a pregnancy exception.¹⁵⁹ The bylaws merely state that “[a] member institution may approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy.”¹⁶⁰ As a result, a female student-athlete who plays basketball may theoretically obtain another year of eligibility “for reasons of pregnancy” even if she gives birth six weeks prior to the beginning of her basketball season.¹⁶¹ At the beginning of her basketball season, the female student-athlete would no longer have a physical disability, yet she would still receive an additional year of eligibility.¹⁶² This additional time off beyond her period of physical disability is equivalent to childrearing leave.¹⁶³ In contrast, under present NCAA rules, a male student-athlete who fathered that same baby and also played basketball would not be allowed the same time off for childrearing leave.¹⁶⁴ Therefore, the NCAA’s pregnancy exception violates Title IX because it allows for childrearing leave in the form of an additional year of eligibility to female student-athletes but not to male student-athletes.¹⁶⁵

In *Schafer v. Board of Public Education of the School District of Pittsburgh*, the U.S. Court of Appeals for the Third Circuit held that employers must offer to male employees the same amount of chil-

159. See *id.* (noting failure of NCAA bylaws to address timing of pregnancy in relation to athletic season of female student-athlete).

160. See *id.* (recognizing that under NCAA bylaw, only member institution may approve pregnancy exception for female student-athlete).

161. See *id.* (giving member institution authority to approve pregnancy exception for female student-athlete, but failing to establish details regarding when exception may be granted); see also Wood, *supra* note 30 (describing Butler’s argument that NCAA bylaws discriminate against him because bylaws do not mandate that member institution only grant pregnancy exception to female student-athlete for time period during her pregnancy).

162. See Patterson, *supra* note 80, at 436 (noting that six weeks is typical period of physical disability related to pregnancy).

163. See *id.* at 438-39 (stating that time off provided to female employees after period of physical disability is considered childrearing leave, which is leave provided for childcare and bonding with infant).

164. See *NCAA Denies Appeal*, *supra* note 5 (quoting NCAA employee as stating, “pregnancy exception is explicitly written for female students . . . and therefore is not applicable in [Butler’s] case”).

165. See *Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa.*, 903 F.2d 243, 250 (3d Cir. 1990) (ruling that Title VII prohibits childrearing leave to be offered to female employees but not to male employees). Further, because courts use Title VII standards to interpret Title IX, Title IX also prohibits an entity from offering childrearing leave to females but not to males. See *Mabry v. State Bd. of Cmty. Colls. and Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987) (applying Title VII precedent to Title IX gender discrimination case in U.S. Court of Appeals for Tenth Circuit).

drearing leave offered to female employees.¹⁶⁶ Even though *Schafer* involved a Title VII claim, *Schafer* still controls Butler's Title IX claim because the U.S. Court of Appeals for the Tenth Circuit held that the standards established under Title VII apply to the interpretation of Title IX.¹⁶⁷ Further, in *Chipman v. Grant County School District*, the U.S. District Court for the Eastern District of Kentucky specifically held that Title VII precedent applies to a Title IX pregnancy discrimination claim.¹⁶⁸ Thus, an institution discriminates if

166. See 903 F.2d at 250 (stating that "under the law, childrearing by a mother or childrearing by a father should be on the basis of full parity"). The court required the employer to offer male employees the same amount of leave offered to female employees for which the employer did not require the female employees to show a physical disability. See *id.* at 248 n.5 (citing typical disability period related to pregnancy to be six weeks, not one year as offered by employer); see also *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (stressing legality of California statute because it only allows time off for physical disability of female employees).

167. See *Mabry*, 813 F.2d at 316 (applying Title VII precedent to Title IX gender discrimination case in U.S. Court of Appeals for Tenth Circuit). The Tenth Circuit's holding in *Mabry* binds the U.S. District Court for District of Kansas, the court hearing Butler's case. See Administrative Office of the U.S. Courts, <http://www.uscourts.gov/courtlinks/> (last visited Mar. 30, 2007) (showing that U.S. District Court for District of Kansas is part of Tenth Circuit); see also *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 899 (1st Cir. 1988) (ruling that Title VII analysis is appropriate to determine validity of claim under Title IX in U.S. Court of Appeals for First Circuit); *Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (holding that like "most courts[,] U.S. Court of Appeals for Fourth Circuit agrees, "Title VII principles should be applied to Title IX actions"); *Brine v. Univ. of Iowa*, 90 F.3d 271, 276 (8th Cir. 1996) (affirming that U.S. Court of Appeals for Eighth Circuit will apply Title VII precedent to Title IX case). But see *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65 n.4 (1992) (refusing to decide whether Title VII precedent should be used to interpret Title IX case because plaintiff did not raise issue); *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622 (11th Cir. 1990), *rev'd on other grounds*, 503 U.S. 60 (1992) (ruling that U.S. Court of Appeals for Eleventh Circuit will not apply Title VII reasoning to determine outcome of Title IX claim because to do so would not create "the kind of orderly analysis so necessary in this confusing area of the law").

168. See 30 F. Supp. 2d 975, 978 (E.D. Ky. 1998) (noting that because Title VII and Title IX have similar purpose of preventing discrimination on basis of gender, precedent under Title VII's Pregnancy Discrimination Act ("PDA") can be applied to Title IX case). "Use of a disparate impact theory for proving discrimination is well-recognized in [Title VII] pregnancy cases." *Id.* Therefore, Butler may prove that the NCAA's pregnancy exception discriminates against him by showing that "a particular . . . practice has caused a significant adverse effect on a protected group." *Id.* at 979 (quoting *U.S. v. City of Warren, Mich.*, 138 F.3d 1038, 1091-92 (6th Cir. 1998)). The burden then shifts to the NCAA "to show that the challenged practice is a reasonable necessity." *Id.* at 979. Alternatively, Butler can also prove discrimination under Title IX using a disparate treatment theory. See *id.* (highlighting district court's belief in "high probability of success on the more common disparate treatment theory"). First, Butler must prove that "[he] is a member of a protected class who has been treated differently because of [his] sex" *Id.* The burden then shifts to the NCAA "to articulate legitimate, non-discriminatory reasons" for refusing to grant Butler a pregnancy exception. *Id.* at

it grants leave to pregnant female student-athletes beyond their period of physical disability without offering similar leave to male student-athletes.¹⁶⁹ Because the pregnancy exception applies only to female student-athletes, and because it allows them leave beyond their period of physical disability, the NCAA bylaws discriminate against male student-athletes on the basis of gender.¹⁷⁰

The NCAA could argue that, even if Title IX applies to the NCAA, the NCAA bylaws do not violate Title IX because the bylaws do not discriminate against male student-athletes on the basis of gender.¹⁷¹ The NCAA's pregnancy exception only applies to female student-athletes because only female student-athletes can become pregnant; consequently, only female student-athletes can suffer the physical disability of pregnancy.¹⁷² The Supreme Court has specifically stated that an entity does not discriminate if it declines to grant leave to male employees but grants leave to female employees for a physical disability related to pregnancy.¹⁷³

Alternatively, the NCAA can also argue that the U.S. District Court for the District of Kansas should not use Title VII standards to interpret Title IX because the Supreme Court has never ruled on the applicability of Title VII to Title IX.¹⁷⁴ In *Franklin v. Gwinnett County Public Schools*, the Court expressly reserved the issue of whether courts should use Title VII standards to interpret Title

980. Finally, the burden shifts back to Butler "to prove by a preponderance of the evidence that the non-discriminatory reason is a pretext for discrimination." *Id.*

169. See *Schafer*, 903 F.2d at 250 (holding that under Title VII, employer must offer both female and male employees childrearing leave).

170. See 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1.3 (allowing pregnant female student-athletes additional year of eligibility).

171. See *NCAA v. Smith*, 525 U.S. 459, 469-70 (1999) (remanding case to U.S. Court of Appeals for Third Circuit for determination of whether NCAA is subject to Title IX); see also *Smith v. NCAA*, 266 F.3d 152 at 157, 163 (2001) (finding that NCAA is not subject to Title IX under "controlling authority" theory, but remanding to district court for determination of whether NCAA is subject to Title IX as result of its relationship with NYSP Fund); *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (reasoning that statute which provides leave to female employees but not to male employees does not constitute gender discrimination under Title VII so long as statute is narrowly written to include only period of actual physical disability related to pregnancy).

172. See *NCAA Denies Appeal*, *supra* note 5 (noting NCAA's statement that pregnancy exception only applies to female student-athletes because only female student-athletes experience change in their "physical condition due to pregnancy").

173. See *Guerra*, 479 U.S. at 276, 280, 290 (ruling that California statute, which refused leave to male employees but allowed up to four months of unpaid leave to female employees for purpose of recovering from "actual physical disability on account of pregnancy," did not violate Title VII).

174. For a further discussion of the Supreme Court's silence as to whether Title VII applies to Title IX claim, see *supra* note 76.

IX.¹⁷⁵ The Court did not address a previous ruling that Title VII should not be applied to Title IX because, while both statutes prohibit discrimination, the statutes do so differently: Title VII bans discrimination outright, whereas Title IX bans discrimination conditionally.¹⁷⁶

Moreover, granting pregnancy leave to a female student-athlete differs from granting pregnancy leave to a female employee.¹⁷⁷ Theoretically, a female employee may continue in her present position until she gives birth; however, a female student-athlete may not because of the physical demands of her sport.¹⁷⁸ Therefore, because a female student-athlete may not be able to participate in her sport after becoming pregnant, the NCAA provides a pregnancy exception.¹⁷⁹

Hypothetically, suppose that a female student-athlete plays basketball and becomes pregnant three months prior to the start of her season. Further, her doctor does not believe that she should play basketball after the first three months of her pregnancy.¹⁸⁰ A typical women's basketball season lasts approximately five and a half months.¹⁸¹ Therefore, the female student-athlete will miss the

175. See 503 U.S. 60, 65 n.4 (1992) (reserving issue of Title VII's applicability to Title IX for time when plaintiff presents argument before Supreme Court).

176. See *Franklin v. Gwinnett County Pub. Schs.*, 911 F.2d 617, 622 (11th Cir. 1990) (declining to extend Title VII analysis to Title IX). For a further discussion of Title VII's applicability to Title IX, see *supra* notes 74-79 and accompanying text.

177. See *Women's Sports Foundation*, <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=1145> (last visited Mar. 30, 2007) (suggesting that pregnant female student-athlete should stop competing when she and her healthcare provider no longer believe it is safe for her to continue).

178. See *id.* (stating that point at which female student-athlete should stop competing depends on many factors, most notably what sport she plays). "It is impossible to provide a set of definitive recommendations that apply to the safe participation of all pregnant females There is simply too much variability with respect to individual fitness levels, intensity and nature of the exercise and specifics of each individual pregnancy." *Id.* (citing American Chiropractic Board of Sports Physicians as to when female student-athlete should stop competing during pregnancy).

179. See *NCAA Denies Appeal*, *supra* note 5 ("[t]he pregnancy exception is explicitly written for female students whose physical condition due to pregnancy prevents their participation in intercollegiate athletics" (quoting NCAA spokesman Erik Christianson)).

180. See *Women's Sports Foundation*, *supra* note 177 (noting that pregnant female student-athlete should decide when to stop playing sports after consulting with her healthcare provider).

181. See 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 17.5.1 (defining length of playing season as "the period of time between the start of preseason practice and the end of the regular playing season"). The Friday closest to Oct. 15th of each year is the start of preseason practice for Division I basketball. See *id.* at art. 17.5.2. Conversely, the Division I championship game marks the end

entire basketball season.¹⁸² The pregnancy exception allows the female student-athlete's member institution to grant her an additional year of eligibility, giving her a total of six years within which to complete her four years of eligibility.¹⁸³ Thus, the female student-athlete receives no additional time off during her season for childrearing leave, and the pregnancy exception does not discriminate on the basis of gender.¹⁸⁴

As the above example illustrates, the NCAA could argue that if there is any discriminatory effect of the pregnancy exception, it is negligible; the discriminatory effect varies depending on the birth of the baby in relation to the athletic season of the student-athlete.¹⁸⁵ However, consider one final example: a couple has a baby, and both parents play basketball at the same member institution. If the female student-athlete has the baby with ten weeks remaining in the basketball season, then any time off that she receives past the initial six weeks after the baby's birth must also be offered to the male student-athlete.¹⁸⁶ If the female student-athlete chooses not to play basketball for the last four weeks of the season, and if the member institution grants her a pregnancy exception, then the member institution also must offer the male student-athlete a preg-

of the regular playing season. *See id.* at art. 17.5.4. Therefore, the 2006-2007 women's Division I basketball season lasts from Friday, Oct. 13, 2006 through Monday, April 2, 2007, which is roughly five and one half months. *See* CBS Sportsline.com, <http://www.sportsline.com/collegebasketball> (on file with author) (listing NCAA Tournament Championship as scheduled for April 2, 2007).

182. *See* Salynn Boyles, *Typical Pregnancy Now 39 Weeks, Not 40*, WebMD, Mar. 23, 2006, <http://www.webmd.com/content/article/120/113711.htm> (last visited Mar. 30, 2007) (stating that thirty-nine weeks is most common length of pregnancy). Thus, if the female student-athlete is pregnant twelve weeks prior to the start of the season and twenty-two weeks during the season, then her pregnancy lasts the entire basketball season.

183. *See* 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1 (noting typical student-athlete has five calendar years from date of initial full-time college enrollment within which to utilize four years of eligibility).

184. *See* Patterson, *supra* note 80, at 430 (defining childrearing leave as any additional time female receives after giving birth and recovering from physical disability of childbirth).

185. For a further discussion of the discriminatory effect of the pregnancy exception, see *supra* notes 156-65 and accompanying text.

186. *See* Patterson, *supra* note 80, at 436 (relying on medical textbooks for determination that female is typically fully recovered from physical disability of pregnancy within six weeks of giving birth); *see also* Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa., 903 F.2d 243, 250 (3d Cir. 1990) (holding that it is discriminatory under Title VII to grant time to female employees beyond their period of physical disability without also offering similar time to male employees); *Mabry v. State Bd. of Cmty. Colls. and Occupational Educ.*, 813 F.2d 311, 316 (10th Cir. 1987) (holding that, in U.S. Court of Appeals for Tenth Circuit, Title VII standards will be used to interpret Title IX cases).

nancy exception or its equivalent.¹⁸⁷ The NCAA bylaws discriminate against male student-athletes on the basis of gender; the bylaws do not allow a member institution to grant male student-athletes a pregnancy exception or its equivalent, and the bylaws do not limit the circumstances under which a member institution may grant female student-athletes a pregnancy exception.¹⁸⁸

IV. CONCLUSION

At first glance it may seem appropriate for the NCAA's pregnancy exception to apply only to female student-athletes.¹⁸⁹ However, because courts apply Title VII standards to Title IX claims, Butler makes a persuasive argument that the NCAA bylaws discriminate against male student-athletes.¹⁹⁰ Title VII prohibits employers from granting female employees time off without a showing of actual physical disability related to childbirth.¹⁹¹ In addition, Title VII forbids employers from granting female employees leave beyond their physical disability related to pregnancy without offering male employees similar leave.¹⁹² In marked contrast, the NCAA's pregnancy exception allows female student-athletes time off from their sport without a showing of actual physical disability related to pregnancy.¹⁹³ Moreover, NCAA rules do not provide a similar exception for male student-athletes who father a baby.¹⁹⁴ Therefore, the

187. For a further discussion of the discriminatory aspects of the pregnancy exception, see *supra* notes 156-65 and accompanying text.

188. See *Schafer*, 903 F.2d at 250 (holding that for any leave for which employer does not require female employee to show physical disability, employer must offer same leave to male employees).

189. See Schluskel, *supra* note 2 (quoting NCAA official: "[t]he pregnancy exception is explicitly written for female students whose physical condition due to pregnancy prevents their participation in intercollegiate athletics, and therefore is not applicable in this case").

190. See *Mabry*, 813 F.2d at 316 (stating that Title VII precedent should be used to interpret Title IX cases in U.S. Court of Appeals for Tenth Circuit).

191. See *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987) (ruling that statute giving time off to female employees but not to male employees does not constitute gender discrimination under Title VII because statute only provides leave for female employees while they are physically disabled).

192. See *Schafer*, 903 F.2d at 250 (requiring employer to offer male employees any time that female employees receive beyond their period of physical disability related to pregnancy).

193. See 2006-2007 NCAA DIVISION I MANUAL, *supra* note 4, at art. 14.2.1.3 (noting that NCAA bylaws do not specify conditions in which member institution may approve pregnancy exception for female student-athlete).

194. See *id.* at art. 14.2.1.5 (noting that although NCAA bylaws do not offer pregnancy exception or its equivalent for male student-athletes, NCAA bylaws do offer "Additional Waivers" to be approved by two-thirds vote of majority of NCAA committee present); see also Wood, *supra* note 30 (stating that, under present

NCAA rules violate Title IX as interpreted under *California Federal Savings and Loan Assoc. v. Guerra* and *Schafer v. Board of Public Education* because the rules do not require a showing of physical disability and do not offer similar time off for male student-athletes.¹⁹⁵ Because a pregnancy exception grants female student-athletes an entire year of eligibility, female student-athletes necessarily receive time off beyond their physical disability.¹⁹⁶ The NCAA must acknowledge this fault in its rules and alter the rules accordingly to become Title IX-compliant.¹⁹⁷ Regrettably, a change in NCAA rules would come too late for Butler to have enjoyed his final season at KU.¹⁹⁸

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NCAA bylaws, no waiver equivalent to pregnancy exception exists for male student-athletes).

195. See *Guerra*, 479 U.S. at 290 (holding that statute is valid under Title VII because statute only provides leave for female employees while they are physically disabled); see also *Schafer*, 903 F.2d at 250 (requiring that if employer offers leave to female employees beyond their period of physical disability related to pregnancy, then employer must offer same leave to male employees).

196. See *Patterson*, *supra* note 80, at 436 (citing medical textbooks which state that woman's reproductive organs physically recover from pregnancy within six weeks after childbirth).

197. See *Schafer*, 903 F.2d at 250 (ruling that employer discriminated when it gave time off to female employees beyond their physical disability but did not offer equivalent time off to male employees).

198. See *Suit Tests Ban*, *supra* note 6 (stressing need for U.S. Court of Appeals for Tenth Circuit to reverse lower court's ruling quickly in order for Butler to be eligible to play in 2006 football season at KU).

* 2008 J.D. candidate, Villanova University School of Law; Bachelors and Masters of Accountancy, University of Missouri – Columbia, 2002; C.P.A. license, 2004. Thank you to my friends and family for their wonderful support and understanding.